THE MILITARY JUSTICE ACT OF 1982

HEARINGS
BEFORE THE
SUBCOMMITTEE ON MANPOWER AND PERSONNEL
OF THE
COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
SECOND SESSION
ON
S. 2521

TO AMEND CHAPTER 47 OF TITLE 10, UNITED STATES CODE (UNIFORM CODE OF MILITARY JUSTICE), TO IMPROVE THE MILITARY JUSTICE SYSTEM, AND FOR OTHER PURPOSES

SEPTEMBER 9, 16, 1982

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THE MILITARY JUSTICE ACT OF 1982

THURSDAY, SEPTEMBER 9, 1982

U.S. SENATE,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met in open session, pursuant to notice, at 9:45 a.m., in room 212, Russell Senate Office Building, Senator Roger W. Jepsen (chairman) presiding.

Member present: Senator Roger W. Jepsen.

Staff present: Anthony J. Principi, counsel; Paul C. Besozzi, minority counsel; David S. Lyles, professional staff member; and Kimberly A. Manning, staff assistant.

Also present: Buzz Hefti, assistant to Senator Warner; Jim Dykstra, assistant to Senator Cohen; Jon Etherton, assistant to Senator Jepsen; Julia Habel, assistant to Senator Byrd; Gray Armistead, assistant to Senator Byrd; Greg Pallas, assistant to Senator Exon; and Hank Steenstra, assistant to Senator Quayle.

[The bill, S. 2521 follows:]

[S. 2521, 97th Cong., 2d sess.]

A BILL to amend chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to improve the military justice system, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Military Justice Act of 1982".

SEC. 2. Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of chapter 47 of title 10, United States Code (Uniform Code of Military Justice).

SEC. 3. (a) Section 801 (article 1) is amended by striking out clause (13) and inserting in lieu thereof the following:

"(13) 'Judge advocate' means—

"(A) an officer of the Judge Advocate General's Corps of the Army or the Navy;

"(B) an officer of the Air Force or the Marine Corps who is designated a judge advocate; or

"(C) an officer of the Coast Guard who is designated a law specialist.

"(14) 'Record' means a writing relating the proceeding and testimony, or audiotape, videotape, or similar material from which sound or sound and visual images may be reproduced depicting the proceedings.".

(b) Section 806(a) (article 6(a)) is amended—

(1) by striking out "and Air Force and law specialists of the" and inserting in lieu thereof "Air Force, and"; and

(2) by adding at the end thereof the following new sentence: "However, no person may be assigned any duty to be performed by a judge advocate under this chapter unless such person is at the time of the performance of

such duty a member in good standing of the bar of a Federal court or the highest court of a State or territory.".

(c) Section 815(e) (article 15(e)) is amended by striking out "of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or" and inserting in lieu thereof "or a lawyer of the".

(d) Section 816 (article 16) is amended—

(1) by inserting "orally on the record or" before "in writing" in clause (1)(B); and

(2) by striking out clause (3) and inserting in lieu thereof the following:

"(3) summary courts-martial, consisting of one commissioned officer. However, except in those cases of a general court-martial in which the findings announced include a finding of guilty of an offense for which that court-martial may adjudge the death penalty and those cases in which a military judge has not been detailed to the court, a court-martial shall consist of only a military judge after findings are announced.".

(e) Section 819 (article 19) is amended—

(1) by striking out "six months" both places it appears and inserting in lieu thereof "one year";

(2) by striking out "a complete record of the proceedings and testimony has been made," in the third sentence; and

(3) by striking out the comma after "accused" in the third sentence.

(f) Section 826(a) (article 26(a)) is amended by striking out the period at the end thereof and inserting in lieu thereof the following: "and except in those cases of a general court-martial in which the findings announced include a finding of guilty of an offense for which that court-martial may adjudge the death penalty, shall determine and announce the sentence of the court-martial to which he has been detailed.".

(g) Section 827 (article 27) is amended—

(1) in subsection (b)(1), by striking out "of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard,"; and

(2) in subsection (c)(3), by striking out ", or a law specialist,".

(h) Section 832(a) (article 32(a)) is amended by striking out "No charge" and inserting in lieu thereof "Unless the investigation otherwise required by this article is waived in writing by the accused, no charge".

(i) Section 833 (article 33) is amended by striking out "the investigation" and inserting in lieu thereof "any investigation conducted under section 832 of this title (article 32)".

(j) Section 834 (article 34) is amended—

(1) by striking out subsection (a) and inserting in lieu thereof the following:

"(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate. The convening authority may not refer a charge to a general court-martial for trial unless he has been advised orally or in writing by that staff judge advocate that the charge alleges an offense under this chapter and, unless the investigation has been waived by the accused, that the charge is warranted by the evidence indicated in the report of investigation. If that advice is given in writing, such written advice shall accompany the charge or specification if it is referred to trial."; and

(2) by adding at the end thereof the following new subsection:

"(c) The requirements of this section are binding on all persons administering this chapter but failure to allow them does not constitute jurisdictional error.".

(k) Section 838(c) (article 38(c)) is amended to read as follows:

"(c) In any court-martial proceeding resulting in a conviction, the defense counsel may forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on (including any objection to the contents of the record which he considers appropriate), may assist the accused in the submission of matters under section 860 of this title (article 60), and shall, subject to regulations of the President, perform other acts authorized by this chapter.".

(l) Section 84(b) (article 41(b)) is amended by striking out "one" and inserting in lieu thereof "three".

(m) Section 842 (article 42) is amended by striking out ", law specialist," both places it appears.

(n) Section 846 (article 46) is amended by adding at the end thereof the following new sentences: "Pursuant to sections 659(h) of title 28, United States Code, United States marshals shall execute any such process which may be delivered to them for such purpose. Any process issued under this section also may be executed by any person designated for such purpose by the Secretary concerned.".

(o) Section 849 (article 49) is amended—

(1) in subsection (d), by striking out "read" and inserting in lieu thereof "admitted"; and

(2) in subsection (f), by striking out "read" and inserting in lieu thereof "admitted".

(p) Section 851 (article 51) is amended—

(1) in subsection (a), by inserting "(if members are required to determine the sentence)" after "on the sentence";

(2) in subsection (d), by striking out "a military judge only" and inserting in lieu thereof "only a military judge pursuant to an approved request by the accused under clause (1)(B) or (2)(C) of section 816 of this title (article 16)"; and

(3) by adding at the end thereof the following new subsection:

"(e) Subsections (a), (b), (c), and (d) do not apply to the proceedings of a court-martial composed of only a military judge after the announcement of findings pursuant to the last sentence of section 816 of the title (article 16). During such proceedings, the military judge shall determine all questions of law and fact arising during those proceedings and shall adjudge an appropriate sentence.".

(q)(1) Section 853 (article 53) is amended to read as follows:

"§ 853. Art. 53. Court to announce action and advise of rights to appeal and to submit matters to the convening authority

"A court-martial shall announce its findings and sentence to the parties as soon as determined and, if the accused has been found guilty of any offense, shall advise the accused of his right to appeal and of applicable requirements of section 861 of this title (article 61) and of his right to submit matters to the convening authority under section 860 of this title (aricle 60).".

(2) The item relating to section 853 (article 53) in the table of sections at the beginning of subchapter VII is amended to read as follows:

"853. 53. Court to announce action and advise of rights to appeal and to submit matters to the convening authority.".

(r) Section 854 (article 54) is amended—

(1) by striking out the last sentence of subsection (a);

(2) by striking out "shall contain the matter and" in subsection (b); and

(3) by striking out subsection (c) and inserting in lieu thereof the following new subsections:

"(c) A complete record of the proceedings and testimony shall be prepared when—

"(1) the sentence as approved by the convening authority includes death; or

"(2) the sentence as approved by the convening authority includes discharge, dismissal, or confinement at hard labor for more than one year, and a notice of appeal has been timely filed under section 861 of this title (article 61).

"(d) In all other cases, the record shall contain such matter as the President may prescribe.

"(e) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.".

(s)(1) Subchapter VIII is amended by inserting after section 857 (article 57) the following new section:

"857a. Art. 57a. Suspension of sentence by military judge.".

"(a) In every case in which a military judge determines and adjudges a sentence, the military judge may suspend the execution of all or any part of that sentence for a stated period of time not exceeding two years. Any sentence or part of a sentence so suspended, if such suspension is not sooner vacated under the authority of section 872 of this title (article 72) shall be remitted upon—

"(1) the expiration of the stated period of time of such suspension;

"(2) the death of the accused;

"(3) the discharge of the accused from the service which terminates the accused's status as a person subject to this chapter; or

"(4) the release of the accused from active duty in the armed forces.

whichever occurs earlier.

"(b) In any case in which a military judge suspends the execution of all or any part of a sentence, such sentence or the part of such sentence which is suspended may be executed only if such suspension is vacated pursuant to section 872 of this title (article 72). No convening authority or other reviewing authority under this chapter may change such a suspended sentence or the suspended part of such a sentence to a less or equally severe sentence unless such authority also orders that the execution of that sentence or part of that sentence as changed be suspended. However, a convening authority and any other authority having the power under this chapter to approve or disapprove a sentence in whole or in part may approve or disapprove, in whole or in part, any sentence or part of any sentence the execution of which has been suspended by a military judge, and if such sentence or part of such sentence as suspended is approved, any such authority may change the stated period of such suspension to any lesser period of time.

"(c) In determining the expiration of any period of suspension of the execution of any sentence or part of any sentence under this section, such period shall be deemed to begin on the date such sentence or part of such sentence, as suspended, is announced under section 853 of this title (article 53).".

(2) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 857 (article 57) the following new item:

"857a. 57a. Suspension of sentence by military judge.".

(t) (1) Section 860 (article 60) is amended to read as follows:

"§ 860. Art. 60. Action by convening authority

"(a) The convening authority shall be notified of the findings and sentence of a court-martial after the announcement of the sentence. After consideration of any matters submitted under subsection (c) or the expiration of the time for filing of such matters, if none are filed, the convening authority or any officer exercising general court-martial jurisdiction shall act on the sentence. In so acting, he, in his sole discretion, may disapprove the sentence, approve the sentence in whole or in part, or change the sentence to any less or equally severe sentence.

"(b) In his sole discretion, the convening authority may set aside a finding of guilty and dismiss the charge and specification.

"(c) Within ten days after the sentence is announced the accused may submit any matters for consideration by the convening authority in the exercise of his discretion to approve the findings and sentence. If the accused shows that additional time is necessary to submit such matters, the convening authority may extend the period for submission for not more than thirty additional days.

"(d) In the case of any general court-martial in which a finding of guilty has resulted or any special court-martial in which the sentence includes a bad conduct discharge, the convening authority shall refer the record of such court-martial to his staff judge advocate, who shall submit his written recommendation thereon. The convening authority shall consider such recommendation and any rebuttal to that recommendation submitted by the accused under subsection (e) before acting under this section. The written recommendation shall include such matters as may be prescribed by the President. Any such written recommendation and any rebuttal to that recommendation submitted under subsection (e) shall be attached to the record.

"(e) The accused shall be afforded an opportunity to rebut the recommendation of the staff judge advocate, and any matters attached thereto, whether or not the accused submitted matter under subsection (c). The accused shall have five days from receipt of the recommendation in which to submit any matters in rebuttal. The convening authority may, for good cause, extend that period. Failure to rebut the recommendation or any matters attached to it shall constitute waiver of any objection thereto.".

(2) The item relating to section 860 (article 60) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"860. 60. Action by convening authority.".

(u)(1) Section 861 (article 61) is amended to read as follows:

"§ 861. Art. 61. Notice of appeal: withdrawal of appeal

"(a)(1) In every case subject to review under section 866 or 869(a) of this title (article 66 or 69(a)) except a case in which the sentence as approved by the convening authority includes death, the accused, if he wishes further review of such case under this chapter, shall file with the convening authority a notice of appeal. Such notice of appeal shall be signed by the accused and defense counsel and shall be filed within ten days after the accused receives notice in writing of the convening authority's action on the sentence, unless the convening authority, for good cause shown or otherwise in his discretion, extends that period for not more than thirty additional days. Failure to file a notice of appeal within such period bars review under section 866 or 869(a) of this title (article 66 or 69(a)).".

"(2) A notice of appeal filed pursuant to paragraph (1) should identify the issues which the accused believes should be considered on review of the case. Such additional matters as the accused deems appropriate may be attached to the notice of appeal and any such matters will be forwarded as though part of the notice of appeal. The failure to identify an issue in the notice of appeal does not constitute a waiver of that issue by the accused on review.

"(b) If the convening authority, in his sole discretion, believes such action is warranted by any matter identified in or attached to a notice of appeal, he, at any time before the record is forwarded to the Judge Advocate General under section 865(a) of this title (article 65(a)), may revoke any previous action taken under section 860 of this title (article 60) which approved any finding of guilty or any sentence and order a rehearing under section 863 of this title (article 63) or a proceeding in revision under section 862(b) of this title (article 62(b)).

"(c) The accused may withdraw at any time a notice of appeal previously filed. Any such withdrawal shall be in writing and shall be signed by the accused. Such a withdrawal shall bar all further review under sections 866, 867, and 869(a) of this title (articles 66, 67, and 69(a)).".

(2) The item relating to section 861 (article 61) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"861. 61. Notice of appeal: withdrawal of appeal.".

(v)(1) Section 862(a) (article 62(a)) is amended—

(A) by inserting "(1)" after "(a)"; and

(B) by inserting at the end thereof the following new paragraph:

"(2)(A) In any trial by court-martial over which a military judge presides and in which the sentence may include a discharge or dismissal, the convening authority may direct that the United States appeal any order or ruling which terminates the proceedings with respect to any charge or specification or which excludes evidence which is substantial proof of a fact material to the proceedings, except that no such appeal may be directed from an order or ruling which is, or amounts to, a finding of not guilty. Such an appeal may be directed regardless of whether or not such order or ruling has first been returned to the court for reconsideration under paragraph (1). Notice of a direction to appeal an order or ruling under this paragraph shall be provided to the military judge in writing within seventy-two hours after such ruling or order is announced or after a decision on reconsiderations of such ruling or order is announced if such ruling or order has been returned to the court for reconsideration under paragraph (1). Any appeal directed under this paragraph shall be diligently prosecuted.

"(B) Appeals under this paragraph shall be forwarded by an appropriate means directly to the cognizant Court of Military Review and shall ordinarily have priority over all other types of proceedings before that court. In determining an appeal under this section, the Court of Military Review shall take action only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)). Such appeals may be considered by the Court of Military Review sitting en banc or by panel. The decision of the Court of Military Review on the appeal under this paragraph shall not be subject to further review except in posttrial proceedings under section 866, 867, or 869 of this title (article 66, 67, or 69). However, nothing in this section limits the authority of any court to issue any writ pursuant to section 1651 of title 28, United States Code.

"(C) Any delay directly attributable to an appeal under this section shall not be charged to the United States or the accused in deciding any issue as to denial of a speedy trial.".

(2) The item relating to section 862 (article 62) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"862. 62. Reconsideration, appeal by the United States, and revision.".

(w) Section 863 (article 63) is amended by—

(1) striking out subsection (a); and

(2) striking out "(b)".

(x)(1) Sections 864 and 865 (articles 64 and 65) are amended to read as follows:

"§ 864. Art. 64. Review by a judge advocate

"(a) All cases not subject to appeal, and all cases subject to appeal but not appealed, under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate, as prescribed by regulations of the Secretary concerned. The judge advocate shall determine—

"(1) whether the court had jurisdiction of the accused and the offense;

"(2) whether the charge and specification stated an offense; and

"(3) whether the sentence was within the limits prescribed by law.

"(b) If the judge advocate determines that corrective action is required by law, he shall recommend such action to an officer exercising general court-martial jurisdiction over the accused and that officer may—

"(1) disapprove or approve the findings or the sentence, in whole or in part;

"(2) change the sentence to any less or equally severe sentence;

"(3) except where the evidence was insufficient at trial to support the findings, order a rehearing on findings or sentence; or

"(4) dismiss the charges.

"(c) If a rehearing is ordered, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

"(d) If the officer exercising general court-martial jurisdiction does not take the action recommended by the judge advocate (except where the charges are dismissed or other action is taken which is more favorable to an accused than that recommended by the judge advocate), the record of trial and action thereon shall be sent to The Judge Advocate General for review under section 869(b) of this title (article 69(b)).

"(e) A review required by this section may not be performed by a judge advocate who has previously acted as investigating officer, military judge, court member, trial counsel or assistant trial counsel in the same case.

"§ 865. Art. 65. Disposition of records

"(a) After acting under section 860 of this title (article 60) and receiving any papers timely filed under section 861 of this title (article 61), the convening authority shall send the record of trial in a case subject to appeal and appealed under section 866 or 869(a) of this title (article 66 or 69(a)) to the appropriate Judge Advocate General.

"(b) Except as otherwise required by this chapter, all records of trial and related documents in cases other than those described by subsection (a) shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.".

(2) The items relating to sections 864 and 865 (articles 64 and 65) in the table of sections at the beginning of subchapter IX are amended to read as follows:

"864. 64. Review by a judge advocate.

"865. 65. Disposition of records.".

(y) Section 866 (article 66) is amended—

(1) by adding after the second sentence in subsection (a) the following: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules."; and

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b) The Judge Advocate General shall refer to a Court of Military Review the record in every case of trial by court-martial—

"(1) in which the sentence, as approved under section 860 of this title (article 60) extends to death; or

"(2) in which—

"(A) the sentence, as approved under section 860 of this title (article 60) extends to dismissal of a commissioned officer, a cadet, or midshipman, to dishonorable or a bad conduct discharge, or to confinement for more than one year; and

"(B) the accused has timely filed a notice of appeal as provided by section 861 of this title (article 61) and such appeal has not been withdrawn.".

(z) Section 867 (article 67) is amended—

(1) by striking out "or for mental or physical disability," in subsection (a)(2);

(2) by inserting "and the presiding judge informs the President that a retired judge or senior judge is not available for temporary service" after "illness or other disability" in subsection (a)(3);

(3) by striking out subsection (a)(4);

(4) by striking out "affects a general or flag officer or" in subsection (b)(1); and

(5) by striking out "board of review" in subsection (c) and inserting in lieu thereof "Court of Military Review".

(aa)(1) Subchapter IX is amended by inserting after section 867 (article 67) the following new section:

"§ 867a. Art. 67a. Retirement and survivor annuities for judges of the Court of Military Appeals

"(a) The provisions of subsection (b) (relating to retirement), subsection (d) (relating to computation and payment of retired pay), subsection (e) (relating to election to received retired pay), subsection (g) (relating to coordination with civil service retirement), subsection (h) (relating to retirement for disability) and subsection (i) (relating to revocation of election to receive retired pay) of section 7447 of the Internal Revenue Code of 1954 (26 U.S.C. 7447) shall apply to judges of the United States Court of Military Appeals as established by section 867(a) of this title (article 67(a)) except that in construing those provisions for purposes of this section—

"(1) the term 'United States Court of Military Appeals' applies in place of the term 'Tax Court';

"(2) the term 'judge' shall be construed to mean the chief judge or a judge of the United States Court of Military Appeals, but does not include any person performing judicial duties pursuant to subsection (b) or section 867(a)(3) of this title (article 67(a)(3)); and

"(3) in any determination of the length of service of any person as a judge of the United States Court of Military Appeals there shall be included only periods of service (whether or not consecutive) during which such person served as a judge of the United States Court of Military Appeals under this chapter.

"(b)(1) If a judge of the Court of Military Appeals is temporarily unable to perform judicial duties because of illness or other disability, or if there is a vacancy on the court, the presiding judge of the court may call upon any person who has elected to receive retired pay under the provisions of section 7447 of the Internal Revenue Code of 1954, as made applicable to judges of the Court of Military Appeals by subsection (a), to perform such judicial duties with the court as may be requested of such person for the period of such illness, disability, or vacancy, or for any lesser period or periods specified by the presiding judge, except that in the case of any such person—

"(A) the aggregate of such periods in any one calendar year may not exceed ninety days without the person's consent; and

"(B) the person shall be relieved of performing such judicial duties during any period in which illness or disability of such person precludes the performance of such duties.

"(2) Any act, or failure to act, by a person performing judicial duties pursuant to paragraph (1) shall have the same force and effect as if it were the act, or failure to act, of a judge of the Court of Military Appeals, but any such person shall not be counted as a judge of the court of purposes of the second sentence of section 867(a) of this title (article 67(a)).

"(3) Any person who is performing judicial duties pursuant to paragraph (1) shall be paid, in lieu of retired pay, the same compensation as a judge and shall be paid the same allowances for travel and other expenses as a judge.

"(c)(1) Any person who has elected to receive retired pay under the application of 7447(e) of the Internal Revenue Code of 1954 (26 U.S.C. 7447(e)) to judges of the United States Court of Military Appeals in accordance with subsection (a) who thereafter—

"(A) accepts any civil office or employment under the Government of the United States (other than the performance of judicial duties pursuant to subsection (b)); or

"(B) provides legal services to a client in a matter arising under this chapter,

shall forfeit all rights to retired pay under the application of such section of the Internal Revenue Code of 1954 for all periods beginning on or after the first day on which such person accepts such office or employment or provides such legal services.

"(2) Any person who has elected to receive retired pay as described in paragraph (1) who thereafter during any calendar year fails to perform judicial duties required of such person under subsection (b) shall forfeit all rights to retired pay under the application of such section of the Internal Revenue Code of 1954 for the one-year period which begins on the first day on which the person so fails to perform such duties.

"(d) The provisions of section 7448 of the Internal Revenue Code of 1954 (26 U.S.C. 7448) except clauses (1)-(4) of subsection (a) of that section, shall apply to judges of the United States Court of Military Appeals as established by section 867(a) of this title (article 67(a)), except that in construing those provisions for purposes of this section—

"(1) the term 'United States Court of Military Appeals' applies in place of the term 'Tax Court';

"(2) the term 'judge' shall be construed to mean the chief judge or a judge of the United States Court of Military Appeals, including any person receiving retired pay under the application made by subsection (a) of provisions of section 7447 of the Internal Revenue Code of 1954 (26 U.S.C. 7447) to judges of the United States Court of Military Appeals whether or not such person is performing judicial duties under subsection (b);

"(3) the term 'chief judge' shall be construed to mean the chief judge of the United States Court of Military Appeals;

"(4) the term 'judge's salary' shall be construed to mean the salary of a judge received under section 867(a) of this title (article 67(a)), retired pay received under the application made by subsection (a) of the provisions of section 7447 of the Internal Revenue Code of 1954 (26 U.S.C. 7447) to judges of the United States Court of Military Appeals, and compensation (in lieu of retired pay) received under subsection (b)(3); and

"(5) the term 'United States Court of Military Appeals judges survivors annuity fund' applies in place of the term 'Tax Court judges survivors annuity fund';

"(6) the term 'a judge of the United States Court of Military Appeals' applies in place of the term 'a member of the United States Board of Tax Appeals, as a judge of the Tax Court of the United States, and as a judge of the Tax Court' as used in section 7448(n) of the Internal Revenue Code of 1954 (26 U.S.C. 7448(n)); and

"(7) the term 'after enactment of the Act making this section applicable to judges of the United States Court of Military Appeals' applies in place of the term 'after enactment of this section' as used in section 7448(q) of the Internal Revenue Code of 1954 (26 U.S.C. 7448(q)).".

(2) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 867 (article 67) the following new item:

"867a. 67a. Retirement and survivor annuities for judges of the Court of Military Appeals.".

(bb) The text of section 869 (article 69) is amended to read as follows:

"(a) The record of trial of a general court-marshal shall be examined in the Office of The Judge Advocate General if—

"(1) any finding of guilty or sentence has been approved under section 860 of this title (article 60);

"(2) the accused has timely filed a notice of appeal required by section 861 of this title (article 61); and

"(3) such record is not required to be referred to a Court of Military Review under section 866(b) of this title (article 66(b)).

If, as the result of such examination, any finding of guilty or any part of the sentence is found to be unsupportable in law, the Judge Advocate General may modify or set aside any finding of guilty or sentence, in whole or in part. If the Judge Advocate so directs, any record examined under the subsection shall be reviewed by a Court of Military Review under section 866 of this title (article 66), but in that event there shall be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).

"(b) The Judge Advocate General may modify or set aside, in whole or in part, any finding of guilty or sentence in any court-martial not reviewed by a Court of Military Review or examined in the Office of The Judge Advocate General under subsection (a), on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudical to the substantial rights of the accused. When such a case is considered upon application of the accused, the application must be filed in the Office of The Judge Advocate General by the accused on or before—

"(1) October 1, 1983; or

"(2) the last day of the two-year period beginning on the date the sentence is approved under section 860 of this title (article 60),

whichever is later, unless the accused establishes good cause for failure to file within that time. Action may be taken under this subsection notwithstanding section 876 of this title (article 76).

"(c) If the Judge Advocate General sets aside any findings or sentence, he may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority may dismiss the charges.

"(d) If, as the result of examination of a record of trial under subsection (a) or (b), the Judge Advocate General believes that clemency action should be taken, he may recommend such action be taken by the Secretary concerned. In the event of such a recommendation, the Secretary concerned may modify or set aside, in whole or in part, any finding of guilty or sentence and may order that the charges be dismissed.".

(cc) Section 871 (article 71) is amended—

(1) in subsection (a)—

(A) by striking out "or involving a general or flag officer"; and

(B) by striking out "except a death sentence" and inserting in lieu thereof "except that he may not suspend a death sentence";

(2) by striking out "(other than a general or flag officer)" in subsection (b);

(3) by striking out subsections (c) and (d) and inserting in lieu thereof the following:

"(c) That part of a sentence which imposes, unsuspended, dishonorable or bad conduct discharge may not be executed—

"(1) until the end of the forty-day period beginning on the day sentence is announced; or

"(2) if a notice of appeal as required by section 861 of this title (article 61) has been timely filed and such appeal has not been withdrawn, until affirmed by a Court of Military Review, and, in cases reviewed by it, the Court of Military Appeals,

whichever is later.

"(d) Any other court-martial sentence or part thereof may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence."; and

(4) by adding at the end thereof the following new subsection:

"(e) A judge advocate shall advise the convening authority, orally or in writing, as to an appropriate sentence to be ordered executed before execution of any general courtmartial sentence or any special court-martial sentence that includes a bad conduct discharge.".

(dd) (1) Subchapter X is amended by inserting after section 112 (article 112) the following new section:

"§ 912a. Art. 112a. Controlled substances

"(a) As used in this section—

"(1) 'administer', 'controlled substance', 'deliver or delivery', 'distribute', 'manufacture', 'narcotic drug', 'practitioner', and 'ultimate user' have the meanings set forth in section 102 of the Controlled Substances Act (21 U.S.C. 802), and 'phencyclidine' has the meaning set forth in section 310 of the Controlled Substances Act (21 U.S.C. 830);

"(2) 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the order of, a practitioner, and includes the prescribing or administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery;

"(3) 'marihuana' means all parts of the plant botanically classified as genus Cannabis. The term 'Cannabis' includes all species of the genus Cannabis. 'Marihuana' means all parts of the Cannabis plant, whether growing or not;

"(4) 'opiate' means a mixture or substance containing a detectable amount of any narcotic drug that is a controlled substance listed in Schedule I or II, other than a narcotic drug consisting of (A) coca leaves; (B) a compound, manufacture, salt, derivative, or preparation of coca leaves; or (C) a substance chemically identical to a mixture or substance described in subclause (A) or (B);

"(5) 'possess' means to exercise knowing dominion or control over a substance, whether or not such dominion or control is exercised exclusively by the accused or by the accused jointly with another person or persons;

"(6) 'Schedule I', 'schedule II', 'Schedule III', 'Schedule IV', and 'Schedule V' refer to the schedules of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812), as amended from time to time by the Attorney General pursuant to the authority of section 201 of the Controlled Substances Act (21 U.S.C. 811);

"(7) 'traffic' means (A) to sell, pledge, transfer, distribute, dispense, or otherwise to dispose of to another person, whether or not as consideration for anything of value; or (B) to buy, receive, possess, or obtain with the intent to do any act described in subsclause (A); and

"(8) 'use' means the accused's knowing introduction into his body, or the introduction by some person other than the accused into the body of the accused when the accused intends for such introduction to occur, of a substance, whether such introduction be by injection, inhalation, ingestion, or by any other means.

"(b)(1) Any person subject to this chapter who manufactures or traffics an opiate is guilty of trafficking in opiates and shall be punished as a court-martial may direct, except that such punishment may not exceed the punishment set forth in paragraph (2).

"(2) The punishment imposed by a court-martial for an offense under paragraph (1) may not exceed—

"(A) dishonorable discharge, confinement at hard labor for twenty-five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade if the opiate weighs one hundred grams or more; or

"(B) a dishonorable discharge, confinement at hard labor for twenty years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade if the opiate weighs less than one hundred grams.

"(c)(1) Any person subject to this chapter who manufactures or traffics a controlled substance other than an opiate is guilty of trafficking in drugs and shall be punished as a courtmartial may direct, except that such punishment may not exceed the punishment set forth in paragraph (2).

"(2) The punishment imposed by a court-martial for an offense under paragraph (1) may not exceed—

"'(A) dishonorable discharge, confinement at hard labor for twenty-five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is listed in Schedule I or II or is phencyclidine (PCP) and is—

"(i) a kilogram or more of a narcotic drug other than an opiate;

"(ii) five hundred grams or more of phencylidine (PCP); or

"(iii) five grams or more of lysergic acid diethylamide (LSD);

"(B) dishonorable discharge, confinement at hard labor for twenty years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is listed in Schedule I or II or is phencyclidine (PCP) and is—

"(i) less than a kilogram of a narcotic drug other than an opiate;

"(ii) less than five hundred grams of phencyclidine (PCP); or

"(iii) more than fifty kilograms of marihuana, ten kilograms of hashish, or one kilogram of hashish oil;

"(C) dishonorable discharge, confinement at hard labor for fifteen years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is not a narcotic drug, phencyclidine (PCP), or lysergic acid diethylamide (LSD) but is—

"(i) listed in Schedule I or II, except when it is less than one kilogram of marihuana, less than two hundred grams of hashish, or less than twenty grams of hashish oil; or

"(ii) listed in Schedule III;

"(D) dishonorable discharge, confinement at hard labor for ten years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is—

"(i) listed in Schedule IV; or

"(ii) less than one kilogram but thirty grams or more of marihuana, less than two hundred grams of hashish, or less than twenty grams of hashish oil; or

"(E) dishonorable discharge, confinement at hard labor for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is—

"(i) listed in Schedule V; or

"(ii) less than thirty grams of marihuana.

"(d)(1) Any person subject to this chapter who possesses a controlled substance is guilty of possessing drugs and shall be punished as a court-martial may direct, except that such punishment may not exceed the punishment set forth in paragraph (2).

"(2) The punishment imposed by a court-martial for an offense under paragraph (1) may not exceed—

"(A) dishonorable discharge, confinement at hard labor for fifteen years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is thirty grams or more of an opiate;

"(B) dishonorable discharge, confinement at hard labor for twelve years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is—

"(i) less than thirty grams of opiate;

"(ii) thirty grams or more of a narcotic drug other than an opiate; or

"(iii) phencyclidine (PCP) or lysergic acid diethylamide (LSD);

"(C) dishonorable discharge, confinement at hard labor for eight years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is not an opiate, is not thirty grams or more of a narcotic drug other than an opiate, and is not phencyclidine (PCP) or lysergic acid diethylamide (LSD) but is—

"(i) listed in Schedule I or II, except when it is less than one kilogram of marihuana, two hundred grams of hashish, or twenty grams of hashish oil; or

"(ii) listed in Schedule III;

"(D) dishonorable discharge, confinement at hard labor for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is—

"(i) less than one kilogram but thirty grams or more of marihuana, less than two hundred grams of hashish, or less than twenty grams of hashish oil; or

"(ii) listed in Schedule IV; or

"(E) dishonorable discharge, confinement at hard labor for two years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is—

"(i) less than thirty grams of marihuana; or

"(ii) listed in Schedule V.

"(e)(1) Any person subject to this chapter who uses a controlled substance is guilty of using drugs and shall be punished as a court-martial may direct, except that such punishment may not exceed the punishment set forth in paragraph (2).

"(2) The punishment imposed by a court-martial for an offense under paragraph (1) may not exceed—

"(A) dishonorable discharge, confinement at hard labor for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade when the controlled substance is used—

"(i) aboard a military vessel or aircraft;

"(ii) while engaged in the performance of duties as a sentinel or lookout; or

"(iii) during time of war; or

"(B) dishonorable discharge, confinement at hard labor for two years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade in any case not described by clause (A).

"(f)(1) It shall be a defense to any charge under this section that the accused's conduct was authorized by the provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or was authorized or required by any other lawful authority when such defense is raised by the evidence and the court-martial is not convinced beyond reasonable doubt that the basis for that defense does not exist.

"(2) It shall be a defense to any charge under subsections (d) and (e) of this section that the controlled substance possessed or used was obtained or used by the accused from, or pursuant to a valid prescription or order issued by, a practitioner acting in the course of his professional practice when such defense is raised by the evidence and the court-martial is not convinced beyond reasonable doubt that the basis for that defense does not exist.

"(g) Nothing in this section limits the authority of the President under section 856 of this title (article 56) to further limit the maximum punishments which may be imposed by a court-martial for offenses under this section.".

(2) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 912 (article 112) the following new item:

"912a. 112a. Controlled substances.".

(ee) Section 963(a) (article 136(a)) is amended—

(1) by striking out "of the Army, Navy, Air Force, and Marine Corps";

(2) by striking out clause (2); and

(3) by redesignating clauses (3)-(7) as clauses (2)-(6), respectively.

SEC. 4. Chapter 79 of title 10, United States Code, relating to correction of military records, is amended as follows:

(a) Section 1552 is amended by adding at the end thereof the following new subsection:

"(f) The authority of subsection (a) may be exercised with respect to a record of courts-martial under chapter 47 of this title and related administrative records only to—

"(1) correct a record to reflect the action by reviewing authorities under such chapter; or

"(2) change a discharge or dismissal of such court-martial, or to issue a new discharge, when such correction is determined appropriate as a matter of clemency.".

(b) Section 1553(a) is amended by striking out "general".

SEC. 5. Section 7(b)(1) of the Military Justice Amendments of 1981 (Public Law 97–81, 95 Stat. 1089) is amended to read as follows:

"(b)(1) The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after January 20, 1982—

"(A) under section 864 or 865 (article 64 or 65) of title 10, United States Code, by the officer exercising general court-martial jurisdiction under the provisions of such section as it existed on the day before the effective date of the Military Justice Act of 1982; or

"(B) under section 860 (article 60) of title 10, United States Code, by the officer empowered to act on the sentence on or after the effective date of the Military Justice Act of 1982.".

SEC. 6. (a) (1) Except as otherwise expressly provided, the amendments made by sections 3, 4, and 5 of this Act shall be effective on the first day of the sixth month that begins after the date of enactment of this Act.

(2) The amendments made by section 3 of this Act shall not apply to any case in which, before the effective date of this Act, any charge has been referred to trial, and in any such case all proceedings under chapter 47 of title 10, United States Code, shall be conducted in accordance with the laws in effect on the day before the effective date of this Act.

(3) The amendments made by sections 4 and 5 of this Act shall not apply to any request for correction of a military record or request for review of a discharge of dismissal that is pending before a Board for Correction of Military Records or a Discharge Review Board on or before the effective date of this Act.

(b) (1) Notwithstanding the amendments made to section 867(a) (4) of title 10, United States Code, by section 3(2) (3) of this Act—

(A) Any individual who is a senior judge of the United States Court of Military Appeals on the date of enactment of this Act and who is not receiving retired pay under the application of section 7447(e) of the Internal Revenue Code of 1954 (26 U.S.C. 7447(e)) to judges of the Court of Military Appeals in accordance with section 867a(a) (article 67a(a)) of title 10, United States Code, as added by subsection 3(aa) (1) of this Act, may be assigned offices in a Federal building and may be provided with a staff assistant, whose compensation may not exceed the highest rate prescribed for grade GS–9 of the General Schedule under section 5332 of title 5, United States Code.

(B) If a judge of the United States Court of Military Appeals is temporarily unable to perform judicial duties because of illness or another disability, or if there is a vacancy on the court, the chief judge of the court may call upon a senior judge, with the consent of the senior judge, to perform judicial duties with the court for the duration of the disability or vacancy. Any act, or failure to act, by an individual performing judicial duties pursuant to this subparagraph shall have the same force and effect as if it were the act (or failure to act) of a judge of the United States Court of Military Appeals, but such individual shall not be counted as a judge of the Court of Military Appeals for the purposes of the second sentence of section 867(a) (article (a)) of title 10, United States Code. Any individual performing such judicial duties pursuant to this subparagraph shall in lieu of retired pay, be paid the same compensation as a judge of such court and shall be paid the same allowances for travel and other expenses as a judge of such court.

(2) Section 867a (article 67a) of title 10, United States Code, as added by section 3(aa) (1) of this Act, shall take effect on the date of enactment of this Act, except that, with respect to a judge of the United States Court of Military Appeals on the date of enactment of this Act, the term "fifteen years or more" as used in section 7447(b) of the Internal Revenue Code of 1954 (26 U.S.C. 7447(b)), as made applicable to judges of the United States Court of Military Appeals by section 867a(a) (article 67a(a)) of title 10, United States Code as added by this Act, shall be read as "ten years or more".

OPENING STATEMENT BY SENATOR ROGER JEPSEN, CHAIRMAN

Senator JEPSEN. The Subcommittee on Manpower and Personnel convenes this morning to receive testimony from the Department of Defense officials on S. 2521, the Military Justice Act of 1982, and on the Defense Department's proposal, the Military Justice Amendments of 1982.

I am pleased to welcome Hon. William H. Taft, general counsel of the Department of Defense: Maj. Gen. Hugh J. Clausen, Judge Advocate General of the Army; Maj. Gen. Thomas B. Bruton, Judge Advocate General of the Air Force; Rear Adm. John S. Jenkins, Judge Advocate General of the Navy; Brig. Gen. William H. J. Tiernan, Director, Judge Advocate Division of the Marine Corps and Rear Adm. Edwin Daniels, chief counsel of the Coast Guard.

Justice and discipline are inextricable, and the latter cannot exist without the former. A country that fails to require its military forces to adhere to a high standard of discipline and obedience to lawful authority could soon find itself defenseless. I believe very strongly that discipline is the cornerstone of an effective fighting force and the fabric that binds the military community together. The system of law to insure that discipline is maintained must not only be fair, but also effective and efficient.

At the conclusion of World War II, there was considerable discussion and criticisms of the justice systems of the Army and Navy which at that time embraced all the military services. As a result of this concern and the enactment of the National Security Act of 1947, unifying the armed services and creating a separate Department of the Air Force, Secretary of Defense Forrestal appointed a special committee to draft a Uniform Code of Military Justice.

After careful and exhaustive deliberation by the Armed Services Committees of both Houses of Congress, the Uniform Code of Military Justice was enacted into law on May 5, 1950.

Since that time the code has proven to have been a fair and efficient framework for the administration of justice and maintenance of discipline in our Armed Forces. Although the military justice system continues to operate in a fairly effective manner today, I believe the time has come for this committee to review the overall operation of the system and to recommend to the Congress needed legislative reform.

I wish to emphasize that the basic structure of our criminal justice system is sound; however, as a result of changes to the code designed to safeguard the rights of the accused, a number of practices are no longer necessary. Elimination of the unnecessary procedures and the adoption of new provisions will permit the military justice system to continue to evolve as a system second to none.

My bill and the Department of Defense proposal make a number of very useful changes in trial and appellate procedures under the Uniform Code of Military Justice. S. 2521 would also recognize the seriousness of drug abuse in the military by establishing a statutory scheme for the prosecution and punishment of drug offenses committed in the Armed Forces.

It is inconceivable to us that there is no specific statutory article pertaining to an offense that represents a most serious threat to our military readiness and constitutes a significant percentage of all courts-martial.

In conclusion, I look forward to working with you and the many individuals and organizations who are knowledgeable of and concerned with the administration of military justice. My bill was introduced to serve as a vehicle to commence our discussion on this very important topic.

Gentlemen, in view of the limited time available to us this morning and in order to permit members to ask questions, I would request that you summarize your written text. Your complete statement will be made an official part of the record as if read.

I shall propound most of my questions to Mr. Taft; however, I invite any panel member to also respond if you so desire.

At this time, Mr. Taft, you may proceed.

STATEMENT OF WILLIAM H. TAFT IV, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Mr. Taft. Thank you, Mr. Chairman.

The arrangement that you have outlined is entirely agreeable to us. It is especially agreeable to me. I have a very long statement of some 75 or 76 pages which I would be glad to be relieved of reading. I will submit it for the record and summarize it for you here.

[See prepared statement, p. 23].

My colleagues have some very short statements for the record which they will submit and we shall be delighted to take your questions whenever you wish to ask them.

At the outset, I want to express my appreciation to you, Mr. Chairman, for calling these hearings and for your strong and continuing interest in military discipline and in the Uniform Code of Military Justice. The legislative effort of this subcommittee has contributed substantially to educating the public on military manpower issues. S. 2521, which you have introduced, reflects keen appreciation and understanding of the need of the military justice system.

THE IMPORTANCE OF THE MILITARY JUSTICE SYSTEM

Before addressing the substance of the proposals before the subcommittee, I would like to emphasize just briefly the important role of the military justice system in the national defense effort.

As you have mentioned, at the heart of our personnel program is an effort to instill pride, professionalism, and discipline as a way of life for members of the Armed Forces. We cannot have an effective military force unless our commanders can depend on their troops to be present, fit for duty, and ready to obey promptly all lawful orders issued to them.

Our primary vehicle for instilling a sense of discipline is the training process, but the Uniform Code of Military Justice and the disciplinary system that it embodies also are essential.

The role of military law in the disciplinary process, the deference the courts give Congress in this area, and the importance of the court-martial process in securing public support of military service are factors that distinguish the Uniform Code of Military Justice from other laws.

It is more than a criminal code. It represents a fundamental pact between the public and the Armed Forces as to the basic rules that establish the unique features of military service. In this sense, it is more akin to a constitution than to a statute.

This view of the UCMJ is underscored by the basic stability of the content and the degree to which it reflects traditional military law. Because the UCMJ represents an expression of fundamental principles rather than a detailed procedural code, there has developed a careful, deliberate process for considering changes.

Within the executive branch of Government we rely primarily on the military services for the evaluation of the court-martial process and for the development of proposed changes. The legislation we have presented to the Congress is based upon our experience under UCMJ and the 1968 amendments.

Although the present system is working well as a general matter, there are a number of areas in which minor amendments have a potential for producing substantial improvements in the effectiveness of the military justice system.

In recent years we have put together a package of amendments to address these concerns and we have considered them in the executive branch very carefully. Last year, due to the efforts of this committee. five of the items were enacted as the Military Justice Amendments of 1981. We have now completed drafting the balance of these amendments.

We are grateful to the committee for considering them at this time. In addition to the care and thoroughness that the executive branch applies to its review of proposed changes. I know that the Congress also has respected the stability of the UCMJ and has always carefully considered the need for stability before acting on any proposed changes.

Each item in the legislative package that we have proposed from DOD was initiated by the military services in response to a specifically identified problem. Each has gone through the lengthy coordination process that I have described in detail in my prepared statement. None of the amendments will affect the fundamental rights guaranteed to service members under the UCMJ.

As a package, however, they will substantially improve the efficiency and effectiveness of the military justice system, thereby enhancing the ability of commanders to use the court-martial process as a means of enforcing disciplinary standards.

In order to put the pending legislation in perspective, I will describe the major features of the military justice system and how the court-martial process would be affected by the key provisions of these amendments. Further details are set forth in my prepared statement.

AMENDMENTS CONCERNING PRETRIAL PROCEDURE

There are a great many technical changes that we are proposing and I do not propose to refer to them here. The primary responsibility for the administration of military justice rests with the military commander. This reflects the fact that the commander is responsible for discipline within his command.

The commander determines which cases should go to trial, what kind of trial is appropriate, who should serve as members of the court-martial, and what action should be taken on the results of the trial.

Neither the DOD bill nor S. 2521 changes the fundamental responsibilities of the commander or the rights of the accused, but each makes minor changes to facilitate the administration of military justice. A pretrial investigation under article 32 is held before a case is referred to a general court-martial except when the investigation is waived by the accused. Both bills reflect current case law and would permit the accused voluntarily to waive pretrial investigation.

Prior to referring a case to general court-martial current law requires the convening authority to make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations and commanders normally rely on staff judge advocates for such advice as to legal conclusions. The amendments that we have proposed will provide formal recognition for this current practice by requiring that legal determinations be actually made by the staff judge advocate. This will relieve commanders of an unnecessary burden while protecting adequately the rights of the accused.

When the convening authority refers a case to trial he selects the members of the court-martial. Under current case law there is substantial doubt as to whether the convening authority may delegate the authority to excuse members, once they have been selected.

Clear authority for such delegation is necessary to eliminate an administrative task that now burdens busy commanders. The current system induces delays in courts-martial with the attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel.

Delays are caused by difficulties involved in securing personal approval of the convening authority for excusal of the member who, because of last minute other difficulties or some other reason, is unable to attend the court-martial. These problems are significant in peacetime.

In a combat environment the problems would be even worse as the convening authority frequently would be distant from the location of the court-martial, means of communication would be extremely limited, and more pressing duties would demand the commanding officer's time. In a combat environment, the need to excuse members, particularly for last minute exigencies, is likely to be more frequent than it is in peacetime.

Our amendment to article 25(d) of the code will permit the convening authority to delegate the power to excuse members. For the same reasons, our amendment to article 29 will permit the military judge to excuse members for good cause after the court-martial has been assembled.

A related problem involves the current requirement that the convening authority personally detail the military judge and counsel as well as any substitutions. This creates a substantial burden on busy convening authorities, and like the requirement to personally excuse members of the court, leads to unnecessary delay when the convening authority is unavailable to approve substitution of a military judge or counsel.

Selection of the military judge and counsel need not require the personal attention of the convening authority. Indeed the military judges are not in any case assigned to convening authorities, but to the judge advocate general or his designee. Trial counsel and defense counsel are not necessarily assigned to the convening authority's command.

Our bill will authorize the issuance of regulations governing the assignment of military judges and counsel to facilitate the detail and substitution of such personnel without undue burden on the convening authority or delay of the trial.

The court members are responsible for the findings on the issue of guilt or innocence for determination of an appropriate sentence in the event of a finding of guilty. The accused has the right to request trial before the judge alone in noncapital cases. In such cases, the judge renders both the finding and sentence.

Under current law, the request for trial by judge alone must be in writing. This requirement has led to unnecessary appellate litigation concerning technical defects in the written request even if the accused on the record makes a knowing, voluntary, oral choice for trial before a judge.

The amendments made by both the DOD bill and S. 2521 would eliminate this problem by authorizing the oral request on the record at the trial.

GOVERNMENT APPEAL

At the present time there is no procedure for the Government to appeal a ruling by the military judge when such ruling terminates the proceedings with respect to a charge or otherwise excludes important evidence.

Both bills allow appeal by the Government under procedures similar to the right of appeal by the United States in Federal civilian prosecutions.

POSTTRIAL ACTION BY THE CONVENING AUTHORITY

If the accused is found guilty, the case is reported to the convening authority. Under current law, the convening authority makes a determination as to the legality of the findings and sentence.

If the case was tried before a general court-martial or before a special court-martial that adjudged a bad-conduct discharge, the convening authority refers the case to his staff judge advocate for a posttrial review.

With limited exceptions, such cases are then subject to appellate review in the Court of Military Review and a possibility further of review in a Court of Military Appeals.

As a matter of practice, the expectation that convening authorities will conduct a detailed review of the legality of the case is simply unrealistic.

Moreover, as a result of court decisions the staff judge advocate's legal review has become a cumbersome document, consuming substantial time in preparation, and often too lengthy to be of any use to the convening authority. Regretably, it can constitute an independent source of appellate litigation even when the underlying case is free of error.

Both bills address these problems by recognizing the convening authority's posttrial law should involve a matter of command prerogative rather than appellate review.

The proposal also eliminates any requirement for the staff judge advocate to conduct a legal review of the case. The bills, however, authorize the accused to submit matters for the convening authority to consider prior to acting on the sentence.

In addition, the proposals require the convening authority to consider the recommendation submitted by the staff judge advocate before acting on the sentence of all general courts-martial. Such a recommendation will also be required in virtually all special courts-martial in which the sentence includes a bad-conduct discharge. Both bills retain the present requirement that the accused have an opportunity to respond to the staff judge advocate's views.

APPELLATE REVIEW

Under current law, if the convening authority approves the sentence of death, dismissal, punitive discharge or confinement for 1 year or more or, otherwise affects a flag or general officer, a complete record is prepared and the case is reviewed by a Court of Military Review. All other general courts-martial are reviewed by the judge advocate general.

Under current law there is no requirement for notice of appeal and no procedure for waiver or withdrawal of an appeal. Appellate proceedings are held in such cases automatically regardless of whether the accused wishes to appeal even when the trial defense counsel, appellate defense counsel, and accused all determine there are no issues of law to submit on review.

To require automatic review of all such cases represents an inefficient use of judge advocate resources. It also produces unnecessary delays in consideration of cases in which the appeal is not of importance to the accused or the system in general.

Both bills require the accused to file a notice of appeal as a precondition to review by the Courts of Military Review under article 66 or by the judge advocate general under article 69(a). They also eliminate the special treatment of flag and general officer cases. As amended, the jurisdiction of Courts of Military Review in such cases will be the same as jurisdiction over all other military personnel.

Both bills retain automatic review in death penalty cases without requiring notice of appeal.

Even if the case is not subject to appeal or if a notice of appeal is not filed, both bills do assure a thorough legal review of the case. Article 64 requires a judge advocate to review summary courts-martial—not involving a punitive discharge—and other cases in which notice of appeal is not filed.

Further review in such cases may be granted by the judge advocate general on his own motion or on application as provided in article 69(b).

When the judge advocate general reviews such cases at the request of the accused or under his own motion under article 69, present law limits his review to questions of law. Moreover, he cannot review the case for sentence appropriateness and he is not authorized to order a rehearing.

Our bill recognizes that the foregoing powers which are exercised by the Courts of Military Review should be available to the judge Advocate general when he acts as appellate authority in cases that are not subject to consideration in a Court of Military Review.

The procedure for consideration by the Courts of Military Review also requires some fine tuning. Under current case law, the Courts of Military Review cannot order a rehearing en banc to resolve disagreements among panels. This leads to unnecessary delay in obtaining a clear statement of the law.

Both bills provide statutory authority for such reconsideration.

SUPREME COURT REVIEW

After the Court of Military Review completes its action, the Court of Military Appeals may review the case. The court reviews all death penalty cases, cases certified to it by the judge advocate general, and other cases on petition of the accused on a showing of good cause.

There is, however, no present authority for either party to seek Supreme Court review of decisions by the Court of Military Appeals. The accused may attempt, and they do from time to time, to mount a collateral attack. The Government, however, has no judicial recourse from adverse decisions.

Our bill authorizes the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari.

This is a provision that is in our bill, but not in S. 2521.

Senator **Jepsen**. Mr. Taft, can we stop for a second. This point is considered to be one major change recommended, very major in fact.

The bill authorizes, as I understood you to say, the parties to petition the Supreme Court to review decisions of the Court of Military Appeals.

Will you elaborate on the fundamental reason for this rather major change to the basic construction of the Uniform Code of Military Justice and the traditional nature of the military justice system. Why are you recommending that?

Mr. **Taft**. Yes, sir, I will be glad to.

We regard this additional opportunity for appeal to be a natural evolution of the process that has gone on really since World War II and with the 1968 amendments for increasing the extent of the civilian review and the judicial aspects of the system.

In the Court of Military Appeals there are many decisions taken which involve interpretation of statutes and interpretation of the Constitution. These types of cases are quite familiar to the Supreme Court, because they are the type of cases as to which the Supreme Court is the ultimate authority for every other judicial system in the country.

We do not regard the fact that the military justice system is a specialized area of substantive law to be a reason for feeling, any more than in the case of the Tax Court or the Court of Claims, that the Supreme Court should not be the ultimate source of the law for the cases which it chooses to review on its own motion. And I would emphasize that our bill only authorizes the parties to seek certiorari, which is discretionary with the Supreme Court. The Supreme Court decides whether the petition sets forth an important issue that warrants its taking the case and deciding the issue.

We have the utmost respect, I should say, for the Court of Military Appeals and its opinions. That is not, however, to say that we on the Government side, and I imagine the people for the accused, from time to time, would not have disagreement with the outcome of a case.

In instances where these cases are important, where perhaps they involve interpretation of the statute or the constitutional rights of the accused, we feel there ought to be, as there is in any other case in any other judicial system in this country, the opportunity to address the matter to the Supreme Court. The parties should have the opportunity to suggest to the Supreme Court, in the exercise of its discretion that this is a matter that it might wish to decide as an important matter of law. If the Supreme Court agrees with us that such issues warrant its attention, the Supreme Court ought to have that authority and ability to resolve those questions.

IMPACT OF SUPREME COURT REVIEW

Senator **Jepsen**. As a lay person without any formal legal training I share a concern that many millions of Americans share about the sluggishness of the American judicial system procedures, pileups and so on. In fact, we are having to look into that in depth.

Not too long ago Justice Stephens of the Supreme Court said the Supreme Court cannot keep up with the current volume of work. When you were looking into this and making recommendations did anyone interview the Supreme Court about how they look on this, with all the additional cases that will come before the Court?

As an option have you considered petitions to a lower Federal court such as the Circuit Court of Appeals?

Mr. **Taft**. I have not personally spoken with any of the members of the Supreme Court. We have cleared the administration proposal with the Department of Justice and specifically, because it would be their responsibility. The Office of the Solicitor General within the Department of Justice has perhaps as much concern as anyone, next to the Justices themselves, with the state of the Supreme Court's docket.

Senator **Jepsen**. You did discuss the administrative workload with all the various services associated with this?

Mr. **Taft**. This was a matter that was circulated throughout our department and then within the administration, the executive branch, to the Department of Justice and Office of the Solicitor General. I think we are talking about a small caseload here.

The bill that we have proposed would authorize a petition for certiorari only in cases that actually go to the Court of Military Appeals and that are considered, which is on the average of 250 to 300 cases a year. Even in those cases there would only be a petition for certiorari permitted. The impact of this on the caseload of the Supreme Court would not be a substantial increase. As far as actually hearing a case, that would be completely within the discretion of the Justices.

Let me just take the last point that you raise about going to a circuit court. I think perhaps in the interest of dockets there would be something to be said for that, although it is my understanding that at least some of the circuits have dockets that are just as crowded as the Supreme Court. Although not all are so crowded. But I would be reluctant to suggest that a decision by the Court of Military Appeals was not really already being made by a court of as high authority as any of the Circuit Courts of Appeal.

I think the quality of the decisions and the authority of that court are already on the level of the circuit courts of appeals. They are the highest Court we have and appeals to a higher court should be the Supreme Court.

Senator **Jepsen**. Would that diminish the stature of the Military Court of Appeals?

Mr. **Taft**. I don't believe it will. It certainly is not our intention to do so. I do not think any of the judges of the court would find that the stature of their court is at all dependent on the fact that they are not subject to the review of the Supreme Court. That is a general condition for all courts.

I think that they would understand that the stature of this court is dependent on the quality of their performance and the way in which they treat their cases. To say that a court is subject to the review by the Supreme Court when the Supreme Court wants to review its decision doesn't denigrate stature of the court subject to such review.

Any judge would like to be a part of that system.

Senator JEPSEN. Thank you.

I wanted to explore it while you were on this point. It is on one of the major changes. We will hear from the Military Court of Appeals next week.

Mr. TAFT. I appreciate it. I think it is one of the major differences between our bill and S. 2521. It is an important proposal and I am sure that will receive your consideration and we will be glad to discuss it further as you wish.

The other differences that I would like to mention involve two provisions that are in S. 2521 that are not in our bill.

CONFINEMENT POWERS OF SPECIAL COURTS-MARTIAL

The first is that S. 2521 would increase the confinement powers of a special court-martial from 6 months to 1 year, consistent with the Federal civilian law for misdemeanors.

Available data suggests that a significant number of cases are referred for trial by general courts martial, which have no punishment limitation, because the present ceiling of 6 months on punishment by special courts-martial is too stringent.

This not only means a greater burden on the Government in terms of requirement for an article 32 pretrial investigation and a greater number of persons sitting on the court; it also presents the accused with a risk of substantial confinement limited only by the maximum punishment for the offense, which may be a period of many years.

We support the amendment proposed in S. 2521, though not included in our bill, and we recommend that the protections afforded an accused when a bad-conduct discharge is adjudged by a special court-martial apply when confinement for more than 6 months is adjudged by the court-martial.

With that additional caution, we would support the extended punishment that could be meted out by a special court-martial.

SENTENCING BY THE MILITARY JUDGE IN ALL NONCAPITAL CASES

The second provision in S. 2521 that is not in our bill would authorize the military judge to adjudge the sentence in all noncapital cases even when the members decide the issue of guilt or innocence. Although there is some advantage to this approach, the department does not believe that it is wise to make this change at this time.

We have considered the proposal most thoroughly and I have discussed the subject at length with representatives of all of the offices that administer the military justice system. Frankly, there is disagreement amongst the representatives of those offices that I have talked with about the desirability of the proposed change.

In these circumstances, I have not been able to conclude that to require judge-alone sentencing in all non-capital cases would not jeopardize important principles of military law involving participation of officers in critical aspects of military discipline, nor have I been able to conclude that it would not deprive the accused of an option he now enjoys under our system and has not abused.

Accordingly, we would recommend that this proposal be subjected to further study and analysis before being acted on by the Congress in this session. We will come back to you with the results of our further discussions and work with you on that.

I think this concludes my oral summary of what I have included in my statement. I will be glad to take any questions.

Perhaps you would like also to hear from my colleagues who have a wealth of experience in the administration of military justice and we are available to you in whatever form you would like.

[The prepared statement of Mr. William H. Taft IV, follows:]

PREPARED STATEMENT OF WILLIAM H. TAFT IV, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Mr. Chairman and members of the Subcommittee, I am grateful for the opportunity to present the views of the Department of Defense on pending bills to revise the Uniform Code of Military Justice (UCMJ). I particularly want to express our appreciation to the Chairman for scheduling these hearings and for his strong and continuing interest in military discipline.

The legislative efforts of this Subcommittee have contributed substantially to educating public on military manpower issues. S. 2521, introduced by the Chairman, reflects a keen appreciation and understanding of the needs of the military justice system.

The provisions of S. 2521 are substantially similar to the amendments proposed in our bill. Pursuant to the Subcommittee's request, I shall address first those matters in which the bills contain parallel provisions in terms of the rationale for changing the UCMJ. I shall then discuss those provisions of our bill that are not covered in S. 2521. Finally, I shall address those matters in S. 2521 that are not covered in our bill.

Before addressing the substance of these proposals, I would like to discuss briefly the important role of the military justice system in the national defense effort, the process by which our amendments were drafted, and the particular emphasis on the consideration of military discipline in our evaluation of these amendments.

At the heart of our personnel program is an effort to instill pride, professionalism, and discipline as a way of life for members of the armed forces. We cannot have an effective military force unless our commanders can depend on their troops to be present, fit for duty, and ready to obey promptly all lawful orders.

The need for a disciplinary system for the armed forces is particularly acute in a democratic society. In civilian life, if a person determines that a job entails risks or hazards greater than he is willing to undertake, he is free to seek alternative employment. In the military, although we strive to eliminate unnecessary risks, there is an irreducible minimum of hazard inherent in military training and operations given the nature of modern warfare. We could not have an effective force if our servicemembers were free to walk away from their stations at will. Likewise, the problem of assimilating persons from a democratic society into the military has become even more difficult in recent years. Members of this Subcommittee are well aware of changing disciplinary norms in schools, homes, and in the civilian workplace. Although the armed forces cannot change the manner in which persons act in the civilian sector—nor, as institutions would it be appropriate for them to do so—, we in the Department of Defense should not accept uncritically the standards of civilian society in the context of the military. Instead, it is our obilgation to take young men and women from civilian life and teach them to respect and honor the traditional disciplinary norms that are the keystone of military effectiveness.

Our primary vehicle for instilling a sense of discipline is the training process. In basic training, and throughout a member's career, we strive to emphasze through instruction and example that military service is not simply a job, it is a calling. We can accomplish only so much, however, through instruction and example. Military forces throughout history have had to rely on some form of criminal process to enforce disciplinary norms. Even in World War II, a time now viewed nostalgically as marking the pinnacle of American military effectiveness, our armed forces conducted over two million courts-martial.

Because courts-martial are essential to the national defense, the Supreme Court has granted Congress great discretion in the exercise of the constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces." This has permitted development of procedures and proscription of offenses without the identical constitutional guarantees available to defendants in civilian criminal trials. The Congress has exercised this power, however, in a manner that ensures that fundamental fairness is present throughout the military justice system. This is essential primarily for two reasons. First, the power of a commander over the life and liberty of his subordinates, particularly in wartime, is awesome. When exercised fairly and responsibly, it is a power that commands not only respect and obedience, but also inspires superior performances and sacrifice. If exercised in a capricious and whimsical manner, however, it breeds disrespect and disobedience, traits that are inimical to military effectiveness. Second, the strength of our military is dependent upon the support we receive from civilian society. Our forces, whether based on conscripts or volunteers, are composed primarily of "citizen soldiers." The majority of our servicemembers remain on active duty for only one term before returning to civilian life, and we are heavily dependent upon the reserves for our national defense. Unless the public in general and the parents of servicemembers in particular are convinced that their sons, daughters, and neighbors will be treated fairly while in military service, public support for the armed forces and our missions will quickly erode. That is a development no democratic society can afford.

The role of military law in the disciplinary process, the deference the courts give Congress in this area, and the importance of the court-martial process in securing public support of military service are factors that distinguish the Uniform Code of Military Justice from other laws. It is more than a criminal code; it represents a fundamental pact between the public and the armed forces as to the basic rules that establish the unique features of military service. In this sense, it is more akin to a constitution than a statute. This view of the UCMJ is underscored by the basic stability in its content.

The basic structure of the UCMJ is quite similar to the Articles of War and Articles for the Government of the Navy adopted from the British during the Revolutionary War era. There have been only three major sets of amendments since that time. In the post-World War I era, the Articles of War were amended to establish a process for centralized review of serious cases. After World War II, the Articles of War were amended to limit the potential for unlawful command influence over courts-martial. These changes were soon thereafter incorporated into the UCMJ, which also established uniformity in procedure among all the services, and created the Court of Military Appeals. In 1968, the duties and responsibilities of counsel and military judges were clarified and strengthened.

None of these amendments has added substantially to the text of the underlying code. It still remains a relatively brief statute, particularly when compared to titles 18 and 28 of the U.S. Code, which govern federal criminal trials. This reflects the traditional intent of Congress to set forth in the UCMJ only those fundamental matters that govern the basic relationships between commanders and servicemembers, and to leave the procedural details and specific punishments to Presidential regulations through the Manual for Courts-Martial. In our judgment, this division of responsibility has worked extremely well. Congress has insured that the basic compact between the armed forces and society regarding military service meets the expectations of the citizenry. The President has insured that the procedural details and maximum punishments meet the disciplinary needs of commanders for an efficient and effective court-martial system, subject to the general limitations established by Congress in the UCMJ.

Because the UCMJ represents an expression of fundamental principles, rather than a detailed procedural code, we have developed a careful, deliberate process for considering changes. Within the executive branch of government, we rely primarily on the military services for the evaluation of the court-martial process and for the development of proposed changes. This work is performed by the Joint Service Committee on Military Justice, which is composed of representatives of the Army, Navy, Air Force, Marine Corps, and Coast Guard. Service on the Joint Service Committee is a high honor, and is reserved for senior judge advocates who not only have distinguished themselves in the area of military justice, but who also have exhibited a keen appreciation for the responsibilities of commanders and the details of military operations. The staff papers for the Joint Service Committee are prepared by a Working Group, composed of mid-level judge advocates, again with broad experience, representing the same services. In addition, the services have invited the Court of Military Appeals to participate informally in the Working Group, and the Court has been generous in the provision of staff to assist on various projects.

After a legislative proposal is considered by the Working Group, it is submitted to the Joint Service Committee. When the Joint Service Committee completes its work, it is then reviewed by the "Code Committee," consisting of the Judge Advocates General and the judges of the Court of Military Appeals.

After this review is completed, the Joint Service Committee makes any necessary changes and forwards the proposal to the General Counsel of the Department of Defense. The General Counsel then places the proposal in DoD's legislative reference channels. This provides the military departments and the Joint Chiefs of Staff with the opportunity to comment on the legislation from a command and manpower management perspective, as well as from the legal point of view.

When the internal coordination process is completed, the proposal is forwarded to the Office of Management and Budget for consideration of the views of other agencies, primarily the Departments of Justice and Transportation. After this coordination process is completed, the legislation is forwarded to Congress.

We have structured this processs to produce a thorough review of the legislation by all affected interests within the executive branch in order to ensure that changes to the UCMJ are not recommended unless there is a careful, considered determination that changes are needed in the basic rules governing military justice.

Because the President's authority to promulgate the Manual for Courts-Martial provides the executive branch with broad authority to prescribe the procedural details of the court-martial process, most problems that are encountered in the administration of military justice can be corrected without legislative action. In recent years, we have made major improvements, including a complete revision of the military rules of evidence and the sentencing procedure, through amendments to the Manual. Recently, we submitted a proposed amendment to the President containing a comprehensive set of rules governing the listing and punishment of drug offenses. This amendment will clarify the state of law on various offenses and substantially stiffen the punishment of those who undermine military discipline through the abuse of illegal substances.

There are certain problems, however, that can be corrected only through amendment of the UCMJ. This is the case with respect to the matters contained in the legislation we have proposed.

This legislation is based upon our experience under the UCMJ and the 1968 amendments. Although the present system is working well as a general matter, there are a number of areas in which minor amendments have the potential for producing substantial improvements in the effectiveness of the military justice system. In recent years, we have put together a package of amendments to address these concerns. Last year, due to the efforts of this committee, five of the items were enacted as the Military Justice Amendments of 1981. We have now completed drafting the balance of these amendments, and we are grateful for the committee's consideration of this important legislation.

Each item in legislative package was intiated by the military services in response to a specifically identified problem, and each has gone through the lengthy coordination process that I described earlier in my statement. None of the amendments will affect the fundamental rights guaranteed to servicemembers by the Uniform Code of Military Justice; as a package, however, they will substantially improve the efficiency and effectiveness of the military justice system, thereby enhancing the ability of commanders to use the court-martial process as a means of enforcing disciplinary standards.

Although it is late in the session of this Congress, I am encouraged by these hearings and I urge the subcommittee to press for enactment of this legislation during this Congress. Military justice deserves to be a high priority item. In many respects, the relationship of these amendments to our national defense is similar to the relationship of operation and maintenance accounts to military readiness. In the past, there has been a temptation to treat O&M as a low priority item.

Although individual deficiences never seemed significant, the cumulative impact
Alhough individual deficiences never seemed significant, the cumulative impact
of such neglect ultimately had an extremly negative impact on our readiness. Similiarly, on an individual basis, none of these amendments will make any fundamental changes in the military justice system. Taken as a whole, however, their impact on the disciplinary process should substantially improve the ability of commanders to employ the court-martial process as a means of promoting the readiness of their troops.

I shall now turn to the substantive provisions of the bills before the subcommittee.

I. AN OVERVIEW

In order to put the pending legislation in perspective, I shall begin with a brief description of the military justice system, and how it would be affected by the major provisions of these amendments.

The primary responsibility for the administration of military justice rests with the military commander. This reflects the fact that the commander is responsible for discipline within his command. The commander determines which cases should go to trial, what level of trial is appropriate, who should serve as members of the court-martial, and what action should be taken on the results of trial. Neither bill changes the fundamental responsibilities of the commander or the rights of the accused. but each makes minor changes to facilitate the administration of military justice.

There are three types of courts-martial to which the convening authority may refer a case. A general court-martial, which consists of a military judge and at least five members, or a military judge sitting alone, may adjudge any penalty authorized by the UCMJ and the Manual for Courts-Martial. A special court-martial, which normally consists of a military judge and at least three members or a military judge sitting alone, may adjudge a variety of lesser penalties, including a bad-conduct discharge and confinement at hard labor not to exceed six months. A summary court-martial, which consists of a single summary court officer, also may adjudge a variety of lesser penalties, including confinement at hard labor not to exceed thirty days.

S. 2521 would increase the confinement powers of a special court-martial to one year, consistent with the federal civilian approach to misdemeanors as offenses involving confinement of one year or less. Available data suggest that a significant number of cases are referred for trial by general courts-martial, which have no punishment limitations, because present ceilings on punishments at special courts-martial are too stringent. This not only means a greater burden for the government, in terms of the requirement for an Article 32 pretrial investigation and a greater number of persons sitting on the court, it also presents the accused with a risk of substantial confinement, limited only by the maximum punishment for the offense, which may be a period of many years. We support this amendment, but we recommend in addition that the protections afforded an accused when a bad-conduct discharge is adjudged by a special court-martial (legally qualified counsel, presence of a military judge, preparation of a complete record, and the opportunity to appeal to a Court of Military Review) apply when confinement is for more than six months is imposed by either a special or a general court-martial.

A pretrial investigation under Article 32 is held before a case is referred to a general court-martial, except when the investigation is waived by the accused. Both bills reflect current case law permitting the accused voluntarily to waive the pretrial investigation.

Prior to referring a case to a general court-martial, current law requires the convening authority to make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations, and commanders normally rely on staff judge advocates for such legal conclusions. The amendments will provide formal recognition for current practice by requiring that the legal determinations be made by the staff judge advocate. This will relieve commanders of an unnecessary burden while protecting adequately the rights of the accused.

When the convening authority refers a case to trial, he selects the members of the court-martial. Under current case law, there is substantial doubt as to whether the convening authority may delegate the authority to excuse members. Clear authority for such delegation is necessary to eliminate an unnecessary administrative task that now burdens busy commanders. The current system can produce delays in courts-martial, with the attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel. Delays are caused by difficulties involved in securing the personal approval of the convening authority for excusal of a member who, because of last minute difficulties, is unable to attend the court-martial.

These problems are significant in peacetime. In a combat environment they would be even worse, as the convening authority frequently would be distant from the location of the court-martial, means of communication would be extremely limited, and more pressing duties would demand his time. At the same time, in a combat environment, the need to excuse members, particularly for last minute exigencies, is likely to be more frequent. Our amendment to Article 25(d) will permit the convening authority to delegate the power to excuse members. For the same reasons, our amendments to Article 29 will permit the military judge to excuse members for good cause after the court-martial has been assembled.

A related problem involves the current requirement that the convening authority personally detail the military judge and counsel, as well as any substitutions. This creates a substantial burden on busy convening authorities, and, like the requirement to personally excuse members of the court, leads to unnecessary delay when the convening authority is unavailable to approve a necessary substitution of a military judge or counsel. Selection of the military judge and counsel need not require the personal attention of the convening authority. Military judges are not in any event assigned to the convening authority, but to The Judge Advocate General or his designee. Trial counsel and defense counsel are not necessarily assigned to the convening authority's command; rather, the assignment of counsel is subject to regulations of the military department in accordance with the differing needs and missions of each service. Our bill will authorize the issuance of regulations governing the assignment of military judges and counsel to facilitate the detail and substitution of such personnel without undue burden on the convening authority or delay of the trial.

The court members are responsible for the findings on the issue of guilt or innocence, and for determination of an appropriate sentence in the event of a finding of guilty. The accused has the right to request trial before the judge alone in noncapital cases, in which case the judge renders both the findings and sentence. Under current law, the request for trial by judge alone must be in writing. This had led to unnecessary appellate litigation concerning technical defects in the written request even if the accused on the record makes a knowing, voluntary, oral choice for trial before a specific judge. The amendments made by both bills will eliminate this problem by authorizing an oral request on the record at the trial.

The trial of general and special courts-martial is conducted under rules of evidence and procedure similar to those applicable in civilian trials. Neither bill makes any change in this regard. Both bills reflect modern trends by authorizing use of videotape as a means of recording the proceeding in order to take advantage of the developing technology on use of videotape and similar materials to serve as a record of trial. At the present time, we intend to use this authority only for presenting videotaped depositions in a court-martial and for preserving the record of such depositions without redundant transcription. Neither bill makes any change in the substantive rules concerning admission of depositions, which preserve the basic rights of confrontation.

At the present time, there is no procedure for the government to appeal a ruling by the military judge when such ruling terminates the proceedings with respect to a charge or otherwise excludes important evidence. Both bills allow appeal by the government under procedures similar to the right of appeal by the United States in federal civilian prosecutions.

If the accused is found guilty, the case is reported to the convening authority. Under current law, the convening authority makes a determination as to the legality of the findings and sentence. If the case was tried before a general court-martial, or before a special court-martial that adjudged a bad-conduct discharge, the convening authority refers the case to his staff judge advocate for a post-trial review. With limited exceptions, such cases are then subject to appellate review in the Court of Military Review, with the possibility of further review by the Court of Military Appeals.

As a matter of practice, the expectation that convening authorities will conduct a review of the legality of the case is unrealistic. Moreover, as a result of court decisions, the staff judge advocate's legal review has become a cumbersome document that consumes substantial judge advocate resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is otherwise free of error. Both bills address these problems by recognizing that the convening authority's post-trial role involves a matter of command prerogative rather than appellate review. The proposals also eliminate any requirement for the staff judge advocate to conduct a legal review of the case. Both bills, however, authorize the accused to submit matters for the convening authority to consider prior to acting on the sentence. In addition, the proposals require the convening authority to consider the recommendation submitted by the staff judge advocate before acting on the sentence in all general courts-martial. Such a recommendation also will be required in virtually all special courts-martial in which the sentence includes a bad-conduct discharge. Both bills retain the present requirement that the accused have an opportunity to respond to the staff judge advocate's views.

If the convening authority approves a sentence that extends to death, dismissal, a punitive discharge, or confinement for one year or more, or otherwise affects a flag or general officer, a complete record is prepared and the case is reviewed by a Court of Military Review. All other general courts-martial are reviewed by The Judge Advocate General. Under current law, there is no requirement for a notice of appeal, and no procedure for waiver or withdrawal of appeal.

Appellate proceedings are held in such cases regardless of whether the accused wishes to appeal, even when trial defense counsel, appellate defense counsel, and the accused all determine that there are no issues of law to submit on review. To require automatic review of all such cases represents an inefficient use of judge advocate resources, and unnecessarily delays consideration of cases in which the appeal is of importance to the accused or the system in general. Both bills require the accused to file a notice of appeal as a precondition to review by the Courts of Military Review under Article 66 or by The Judge Advocate General under Article 69(a). They also eliminate the special treatment of flag and general officer cases. As amended, the jurisdiction of the Courts of Military Review in such cases will be the same as jurisdiction over all other military personnel. Both bills retain automatic appeal in death penalty cases without requiring a notice of appeal.

Even if a case is not subject to appeal or if a notice of appeal is not filed, both bills insure a thorough legal review. Article 64 requires a judge advocate to review summary courts-martial, special courts-martial (not involving a punitive discharge), and cases in which a notice of appeal is not filed. Further review in such cases may be granted by The Judge Advocate General on his own motion or upon application as provided in Article 69(b).

When the Judge Advocate General reviews such cases at the request of the accused or on his own motion under Article 69, present law limits his review to questions of law; moreover, he cannot review the case for sentence appropriateness, and he is not authorized to order a rehearing. Our bill recognizes that all of the foregoing powers are exercised by the Courts of Military Review, and should be available to the Judge Advocate General when he acts as an appellate authority in cases that are subject to consideration in a Court of Military Review.

The procedure for consideration by the Courts of Military Review also requires some fine tuning. Under current case law, the Courts of Military Review cannot order a rehearing en banc to resolve disagreements among panels. This leads to unnecessary delay in obtaining a clear statement of the law. Both bills provide statutory authority for such reconsideration.

After the Court of Military Review completes its action, the Court of Military Appeals may review the case. The Court reviews all death penalty cases, cases certified to it by the Judge Advocate General, and other cases upon petition of the accused and a showing of good cause. There is no present authority for either party to seek Supreme Court review of decisions by the Court of Military Appeals. The accused may attempt to mount a collateral attack; the government has no judicial recourse from adverse decisions. Our bill authorizes the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari. We believe that this is an extremely important provision from the perspective of justice and discipline. The Court of Military Appeals regularly interprets federal statutes, executive orders, departmental regulations, and determines the applicability of constitutional provisions to members of the armed forces. The decisions of the Court are of considerable importance to our nation because they directly affect the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system.

Our interest in Supreme Court review does not reflect dissatisfaction with the Court of Military Appeals or with the general tenor of its decisions; rather, the very success of the Court in institutionalizing civilian review has called into question the basis for excluding review by the Supreme Court. As much as I'd like to think that we would always agree with the decisions of the Court of Military Appeals, it is inherent in the creation of an independent tribunal that there will be differences—sometimes significant differences—between the Court and its litigants. In our federal system, the most appropriate forum for resolving such disputes, particularly with respect to interpretation of the Constitution, is the Supreme Court.

In the remainder of my statement I shall consider in more detail the specific amendments made by the two proposals.

II. SUBJECTS COVERED IN BOTH BILLS

I shall address those subjects covered in both bills in terms of the specific amendments we are recommending and the reasons for our proposals. With respect to those matters in which the two bills take a different approach to a similar subject, I shall confine my remarks to major differences. There are a number of matters in which our bill contains minor differences as a matter of style, terminology, or structure in order to facilitate implementation of the amendments. I shall not discuss these minor differences in my statement, but I shall be pleased to answer any questions you may have in this regard and to work with the committee staff to write the best bill possible.

A. *Oral request for trial by judge alone*

Under the current law, a servicemember may not request trial by judge alone unless he or she does so in writing. The requirement for a written request was placed in the law when trial by judge alone was first authorized in 1968 in order to insure that the accused knew the identity of the judge who would try the case prior to making the choice. This technical requirement, however, creates the possibility for administrative error even if the accused on the record makes a knowing, voluntary oral choice for trial before a specific judge. Each such technical defect may cause unnecessary appellate litigation despite the fact that the military judge made a satisfactory inquiry into accused's decision on the record.

Prior to approving a request for trial by judge alone, the military judge inquires on the record as to whether the accused understands his right to trial before a court composed of members, and whether the accused has had an adequate opportunity to consult with counsel about the choice. In view of such procedures, it is not necessary for the statute to require a written request.

Both bills amend Article 16 to permit an oral request for trial by judge alone. As a matter of practice, the Manual for Courts-Martial will continue to authorize use of a written request to ascertain in advance those cases in which it will not be necessary to divert military personnel from their normal duties to sit as court members. The formal request, however, will be made on the record before the military judge. Nothing in the amendments modifies the defense counsel's responsibility to discuss with the accused the right to trial by members; likewise, nothing modifies the military judge's responsibility to determine whether the request should be approved, and to make the inquiries required by current law as to whether the accused is aware of his rights, and has made a knowing, voluntary request to be tried by judge alone.

Because the military judge's inquiry and the response of the accused will be on the record, there is no need for the UCMJ to require a separate written request as a statutory prerequisite to trial by judge alone. With respect to a summarized record (i.e., in courts-martial in which the sentence is not sufficiently serious to authorize review before a Court of Military Review), a standard format will be developed to insure that the inquiry is preserved.

B. *Pretrial advice and referral of charges*

The authority to refer cases to trial is a fundamental responsibility of commanders, and nothing in the amendments made by either bill changes the convening authority's role in this regard. Current law, however, unnecessarily requires commanders to make specific legal determinations prior to referring a case to a general court-martial as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations, and commanders normally rely on staff judge advocates for advice as to such legal conclusions. The amendments made by both bills to Article 34 will provide formal recognition for current practice, without any derogation of the commander's prerogative to make a command decision as to which cases should be tried.

The legal determination as to the sufficiency of the evidence will be based on the evidence in the pretrial investigation, unless the investigation has been waived.

The requirement in our bill that the advice be in writing and accompany the charges if they are referred for trial reflects current practice as prescribed by ¶ 35c of the Manual for Courts-Martial. Because it is not necessary for the advice to set forth the underlying analysis or rationale for the staff judge advocate's conclusions, the requirement for a writing will not be burdensome; the absence of a written record, however, could lead to unnecessary appellate litigation as to whether such advice was given, and if so, whether it covered the required three points of law. Nothing in our bill changes *United States* v. *Ragan*, 14 C.M.A. 119, 33 C.M.R. 331 (1963) which held that failure to follow similar pretrial requirements does not constitute jurisdictional error. Errors, if any, under this section will be tested solely for prejudice to the rights of the accused, the standard set forth in Article 59 for nonjurisdictional errors.

C. *Action on the sentence by the convening authority*

In the past, as successive layers of review have been added to the military justice system, there has been a tendency to retain rather than replace former review procedures, leading to unnecessary duplication. A court-martial involving a punitive discharge, for example, is reviewed successively for legal errors by a staff judge advocate, the convening authority, the Court of Military Review, and, if review is granted, by the Court of Military Appeals.

Both bills will improve the administration of the military justice system by eliminating redundant legal reviews of the case. Because the convening authority cannot increase the severity of the sentence or reverse the rulings of the court-martial on matters of law, there is no need for a detailed legal review in the field. Instead, our bill provides detailed appellate procedures for review by a Court of Military Review under Article 66 in cases in which the approved sentence extends to death, dismissal, a punitive discharge, or a year's confinement; review in the Office of The Judge Advocate General of all other general courts-martial under Article 69(a); and review in the field by a judge advocate in all other cases under Article 64, with the opportunity for further review on application to the Office of the Judge Advocate General under Article 69(b). S. 2521 contains similar amendments.

Both bills permit the accused to submit matters for the convening authority's consideration prior to acting on the sentence. The Manual for Courts-Martial will specify what other information may be used by the convening authority (e.g., personnel records) in acting on the sentence. Implementing rules will likewise govern use of the record of trial by the convening authority. Because the convening authority takes action as a matter of command prerogative rather than as an appellate authority, neither bill retains the statutory requirement that he review the record of trial prior to taking action. There may be circumstances, however, in which a review of the record would be appropriate (e.g., when the accused, in his petition to the convening authority, refers to matter from the sentencing proceeding, or when the petition otherwise causes the convening authority to inquire into the record). The Manual for Courts-Martial will govern the circumstances in which the record, or portions of it, would be prepared prior to the convening authority's action.

Both bills emphasize the role of the convening authority in exercising the responsibility of command when acting on the sentence, and they eliminate any requirement for the convening authority or his staff judge advocate to conduct a legal review of the case.

Both bills, however, require the convening authority to consider the recommendation (not a legal review) submitted by the staff judge advocate before acting on the sentence (including matters of clemency) in all general courts-martial. Such a recommendation also will be required in virtually all special courts-martial in which the sentence includes a bad-conduct discharge. Under our proposal, the recommendation is required in "BCD" special courts-martial only if, under regulations of the Secretary concerned, a staff judge advocate is assigned to the convening authority. The flexibility of our provision reflects the fact that special courts-martial convening authorities may be in command of vessels or smaller installations, facilities, or deployed units to which a staff judge advocate is not assigned.

Both bills represent an improvement over the present law, under which the staff judge advocate's review has become a cumbersome document producing a substantial strain on legal resources; the present requirement also can constitute a source of appellate litigation even when the case is otherwise free of error. It is an unnecessary burden in view of the substantial effort devoted to appellate review by the Courts of Military Review and the Court of Military Appeals. Under both proposals, the responsibility to review the case for legal errors is assigned to appellate authorities, making it unnecessary for the convening authority to receive an extensive legal review of the case prior to taking action.

Under these proposals, the staff judge advocate will provide the convening authority with a concise communication, reflecting the views of the convening authority's principal advisor on military justice matters; it will not be a formal legal review of the proceedings. The President may prescribe the specific form and content of the recommendation. The accused will be entitled to submit matters in rebuttal regardless of whether matters were earlier submitted for the convening authority's consideration under Article 60(c). This reflects current practice under *United States* v. *Goode*, 1 M.J. 3 (C.M.A. 1975). If the accused has any objections to the staff judge advocate's recommendations, those objections must be raised in the rebuttal; failure to do so constitutes a waiver of the objections.

D. *Notice and withdrawal of appeal*

At the present time, there is no requirement for a notice of appeal, and no procedure for waiver or withdrawal of appeal. Appellate proceedings before the Courts of Military Review are held in every case in which the sentence extends to death, dismissal, a punitive discharge, confinement for one year or more, or otherwise affects a general or flag officer. The Judge Advocate General reviews all other general courts-martial. These review proceedings are held regardless of whether the accused wishes to appeal, even when trial defense counsel, appellate defense counsel, and the accused all determine that there are no issues of law to submit on review. Although the number of cases cannot be quantified without intruding on the attorney-client relationship, persons connected with the military appellate system as counsel or judges believe that there are a significant number of cases in which the accused does not desire to appeal and in which counsel determine that there are no substantial issues. To require automatic review of all such cases represents an inefficient use of judge advocate resources, and unnecessarily delays consideration of cases in which the appeal is of importance to the accused or the system in general.

Both bills require the accused to file a notice of appeal as a precondition to review by the Courts of Military Review under Article 66 or by The Judge Advocate General under Article 69(a). The requirement for filing a notice of appeal and the provisions relating to time of filing are based on Rule 4(b) of the Federal Rules of Appellate Procedure with modifications based upon the difference in the military justice system. The notice of appeal is filed with the convening authority as a matter of administrative convenience, not for his review. The form of the notice may be prescribed by regulation.

Even if a notice of appeal is not filed, both bills ensure a thorough legal review. Article 64 requires a judge advocate to review summary courts-martial, special courts-martial (not involving a punitive discharge), and cases in which a notice of appeal is not filed. Further review in such cases may be granted by The Judge Advocate General on his own motion or upon application as provided in Article 69(b).

Both bills retain automatic appeal in death penalty cases without requiring a notice of appeal.

Our bill requires any waiver of appeal to be in writing and signed by both the accused and counsel. Although the civilian sector permits waiver of appeal through inaction, there are significant differences between the military and civilian systems. First, the military system provides the accused wtih separate appellate counsel and complete review of the law, facts, and sentence appropriateness on appeal, whereas the civilian system confines appeal primarily to issues of law and appellate representation is primarily by trial counsel rather than appellate counsel. This means that in the military system, there is much more to gain on appeal, and a much greater likelihood that appellate counsel will scrutinize critically the adequacy of trial defense counsel's representation. Second, service members frequently are assigned to duty at great distances from family and friends, often under difficult circumstances. The credibility of the military justice system rests in great measure in the confidence of the public and the Congress in the competence and professional integrity of defense counsel. Waiver of appeal through inaction of counsel would have a deleterious effect on that confidence. Finally, waiver through inaction of such an important right is bound to lead to litigation over the competence of trial deefnse counsel. This may well consume whatever resources would be saved by eliminating automatic appeal.

We shall develop an appropriate format for the waiver to ensure that it protects the rights of the accused to make an informed choice, and also protects the counsel against challenges of inadequate representation.

Both bills also require the military judge to advise the accused of the requirement to file a notice of appeal. The advice on appellate rights by the miltitary judge is similar to Rule 32(a)(2) of the Federal Rules of Criminal Procedure. In the course of giving this advice, it also is appropriate for the military judge to advise the accused of the right to submit matters for the convening authority to consider prior to acting on the sentence.

As a conforming change, both bills amend Articles 19 and 54 with respect to the contents of the record. Under current law, a "complete" (i.e., verbatim) record is required in all cases subject to review by a Court of Military Review (e.g., death, dismissal, a punitive discharge, or confinement for one year or more). In all other cases, a summarized record of the proceedings is prepared in accordance with rules promulgated by the President in the Manual for Courts-Martial. The proposals would continue the requirement for a complete record in cases reviewed by a Court of Military Review (i.e., death penalty cases and other cases subject to such review in which a notice of appeal is filed) but would permit a summarized record in cases in which the appeal is waived or withdrawn.

In conjunction with the amendments regarding the convening authority's action and the requirement for a notice of appeal, both bills make conforming changes in Article 71 regarding the rules governing execution of the sentence. The amendments made by our bill are somewhat more detailed, and will eliminate the current ambiguity between Article 71, which limits execution of a sentence, and Articles 57 and 58a, which establish the effective date of confinement (the date the sentence is adjudged), forfeitures (the date the sentence is approved by the convening authority), and automatic reduction of an enlisted person to E-1 (when a punitive discharge, confinement, or hard labor is approved by the convening authority). Both bills continue the present requirement that death sentences receive Presidential approval, and that dismissal of an officer be approved by the Secretary of the Military Department concerned. Such reviews are conducted after all legal reviews are completed, and do not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency. Our bill makes it clear that in such cases, the remaining portion of the sentence may be executed when approved by the convening authority, but that the President (in death penalty cases) and the Secretary (in dismissal cases), as a matter of clemency, may remit any previously executed portion of the sentence.

Our bill also continues current law requiring completion of the legal review of the case prior to execution of a punitive discharge. This not only will protect the accused, it will also ensure that the government does not terminate military jurisdiction until a legal review of the case is completed. We believe that this is preferable to S. 2521 which only requires a recommendation by a judge advocate as to sentence appropriateness rather than a legal review prior to execution of the discharge. Moreover, in most cases, the judge advocate's additional recommendation on sentence appropriateness, as required by S. 2521, will be unnecessary, because execution of the discharge will be fairly close in time to the staff judge advocate's recommendation prior to the convening authority's initial action on the sentence. There will be some cases, however, in which the accused has beeen returned to active duty prior to completion of appellate review. In such cases, when a considerable period of time may have elapsed between approval of the sentence by the convening authority and completion of appellate review, it is appropriate for there to be a determination by the authority empowered to execute the discharge as to whether retention on active duty would be in the best interest of the service. The Manual for Courts-Martial will set forth guidance as do the standards for such determinations and the nature of the legal recommendations that should be provided in such cases.

E. *Rehearings*

Both proposals change the focus of the convening authority's action on the case from a legal review to a matter of command prerogative. The convening authority's role is completed after taking action on the findings and sentence, except for transmitting the record and notice of appeal, if any, functions that are primarily ministerial in nature.

Article 63 in our bill continues the authority for proceedings in revision, with the necessary protections against former jeopardy, but it requires that the proceedings be ordered prior to the convening authority's action on the sentence. This power may be exercised by either the convening authority of the military judge. The Manual for Courts-Martial will specify the procedures to be used in determining whether such proceedings should be ordered.

Our bill does not require the convening authority or staff judge advocate to review the proceedings to determine whether proceedings in revision should be ordered or to otherwise conduct a review for legal errors; nor does it require the convening authority to respond to a request by any party for proceedings in revision. It is designed solely to provide an expeditious means to correct errors that happen to be identified in the course of exercising discretion under Article 60(c).

There is one aspect of our rehearing proposal that is not covered in S. 2521, relating to a rehearing subsequent to a guilty plea. Our bill is designed to correct an anomaly in the present law. If an accused pleads guilty, and pursuant to a pretrial agreement, receives a sentence from the convening authority that is less than that adjudged at trial, the maximum sentence that may be imposed on a rehearing under the current law is the sentence contained in the pretrial agreement. This limitation is imposed by current law even if the accused does not plead guilty at a rehearing. The effect of this anomaly is to enable the accused to have the benefit of a pretrial agreement without fulfilling his agreement to plead guilty. Under the amendment, an accused would have the benefit of the original pretrial agreement at a rehearing only if he continued to fulfill its terms. If not, the maximum sentence as to the charges that were covered by the pretrial agreement would be the punishment adjudged at the original trial.

F. *Government appeal*

At the present time, there is no procedure for the government to appeal a ruling by the military judge when such ruling terminates the proceedings with respect to a charge or otherwise excludes important evidence. Both bills amend Article 62 to allow appeal by the government of certain rulings in courts-martial over which a military judge presides and in which a punitive discharge may be adjudged. To the extent practicable, the proposals parallel 18 U.S.C. § 3731, which permits the appeals by the United States in federal civilian prosecutions.

Under our bill, the present version of Art. 62(a), which permits the convening authority to return all legal rulings to a military judge for reconsideration, would be repealed as unnecessary. We do not favor that portion of S. 2521 that would permit the convening authority to return the matter to the court-martial for reconsideration. The Manual for Courts-Martial can set forth procedural rules permitting the trial counsel to request a judge to reconsider a ruling without requiring formal action on the part of the convening authority. We also do not favor that portion of S. 2521 that would require the convening authority to approve any government appeal. The government appeal should be an expedited proceeding that minimizes impact on the trial. A requirement that the convening authority approve any appeal would add considerable delay in view of the possibility that the convening authority would otherwise be involved in important activities, thereby defeating the goal of expediting government appeals. S. 2521 also precludes the Court of Military Appeals from reviewing decisions of a Court of Military Review on a government appeal. We do not favor this limitation. Although the government is not likely to appeal many cases beyond a Court of Military Review, there may be those cases in which such an appeal will serve important government interests. It is preferable to establish a clear statutory procedure for reaching the Court of Military Appeals than to leave this to the uncertain state of extraordinary writ practice under the All Writs Act, 28 U.S.C. § 1651, which would be the only other way for the government to reach the Court of Military Appeals.

G. *Record of trial*

Under present law, the record of trial must be in writing. This does not permit us to take advantage of the developing technology on use of videotape and similar materials to serve as a record of trial. Both bills will authorize use in the record of trial of audiotape, videotape, or similar material from which sound and visual images may be reproduced. At the present time, we intend to use this authority only for presenting videotaped depositions in a court-martial and for preserving the record of such depositions without redundant transcription. Neither bill makes any change in the substantive rules concerning admission of depositions, which preserve the basic rights of confrontation. As the technology improves, we may use videotaped records to preserve the testimony in other portions of the trial. The Manual for Courts-Martial and appellate court rules will set forth procedures governing use of such materials at trial, as well as procedures permitting reviewing authorities to obtain transcripts of such materials.

H. *Review of courts-martial*

At the present time, there is automatic review in a Court of Military Review of all cases in which the sentence extends to death, dismissal, a punitive discharge, confinement of one year or more, or that otherwise involves a flag or general officer. As previously noted, both bills retain the automatic review for death penalty cases, but require a notice of appeal in other cases. In addition, both bills amend Article 66(b) and Article 67 to remove from the mandatory appellate jurisdiction of the Courts of Military Review and Court of Military Appeals cases affecting a general or flag officer that are not otherwise within the jurisdiction of the court. As amended, Court of Military Review jurisdiction over a case affecting a flag or general officer will be the same as jurisdiction over all military personnel. Only a handful of cases have involved flag or general officers since the UCMJ was enacted over 30 years ago; the requirement for mandatory appellate review of all cases affecting such officers, however, may lead to a perception that the Code provides rights to flag and general officers that are not available to other service personnel. Although there are many aspects of military life that required distinctions based upon rank, this is not such a requirement.

The review process will be made more effective through the provision in both bills that would amend Article 66(a) to permit a Court of Military Review, while sitting as a whole, to reconsider the decision of a panel of that court. Article 66 has been interpreted through judicial decision as neither expressly nor impliedly authorizing reconsideration of a panel decision by the whole court. *United States* v. *Chilcote*, 20 C.M.A. 283, 43 C.M.R. 123 (1971); *United States* v. *Wheeler*, 20 C.M.A. 595, 44 C.M.R. 25 (1971). By overriding the *Chilcote* and *Wheeler* decisions, the proposed legislation would assist in resolving conflicts among panels and promote finality of Court of Military Review decisions within the respective services, without the necessity to certify individual panel decisions to the Court of Military Appeals. The bill would in no way affect the right of a military accused to petition the Court of Military Appeals for review of his or her conviction.

Because both proposals permit waiver or withdrawal of appeals, both bills make conforming changes with respect to legal review of cases that are not appealed to a Court of Military Review. Under current law, all summary courts-martial and all special courts-martial not involving a bad-conduct discharge are reviewed by a judge advocate after the convening authority's action is completed. Both bills improve upon current law by establishing the basic requirements for review of cases that are not appealed to a Court of Military Review or examined in the Office of The Judge Advocate General under Article 69(a), and by providing authority to order rehearings. Our bill requires a judge advocate to respond in writing to written allegations of legal error submitted by the accused. This will insure that there is a complete record of the legality of the proceedings in the event of future review under Article 69(b) or in the case of other inquiries.

Our bill provides the judge advocate with broad authority to make recommendations as to disposition, whereas S. 2521 limits the judge advocate's recommendations to matters involving legal errors. Our approach will enable the judge advocate to alert the convening authority as to cases in which a change in the findings or sentence would be appropriate as a matter of command prerogative.

Our bill also requires the convening authority to consider cases involving a dismissal, punitive discharge, confinement for one year or more, or other cases specified in Secretarial regulations. S. 2521 limits the convening authority to considering cases in which the judge advocate identifies a legal error. This does not permit sufficient flexibility to accommodate the need for appropriate action as a matter of command prerogative. Our bill, which requires the judge advocate's review to be in writing, ensures that there is a written record of the review in the event of subsequent proceedings or inquiries.

As previously noted, both bills eliminate the requirement for The Judge Advocate General to examine under Article 69(a) all general courts-martial in which the sentence is not sufficiently severe to invoke the jurisdiction of the Court of Military Review; instead, such cases will be examined only when the accused has filed a notice of appeal that is not waived or withdrawn. A further inefficiency in the current law results from the fact that The Judge Advocate General cannot modify or set aside the sentence in such a case without referring it to a Court of Military Review. Under both bills, The Judge Advocate General may take action favorable to the accused without burdening the Courts of Military Review with such minor cases.

Both bills retain the separate authority for The Judge Advocate General to review cases that are not otherwise reviewed by a Court of Military Review, including summary courts-martial and special courts-martial not involving a punitive discharge (or cases involving a punitive discharge in which a notice of appeal has not been filed). Under current law, however, The Judge Advocate General lacks adequate appellate authority because he does not have the power to order a rehearing. Both bills will permit him to order a rehearing or dismiss the charges when he sets aside the findings or sentence. This is consistent with the powers of the Courts of Military Review under Article 66. In addition, our bill permits The Judge Advocate General to review a case on the question of sentence appropriateness as well as on questions of legal error, consistent with the powers exercised by the Courts of Military Review under Article 66. We do not favor that portion of S. 2521, however, that would authorize The Judge Advocate General to submit clemency recommendations in such cases to the Secretary of the Military Department. The review by The Judge Advocate General should be on issues traditionally considered on appellate review, such as legal error and sentence appropriateness. Moreover, the authority under the DOD bill for The Judge Advocate General to change the sentence on the issue of appropriateness obviates the need for this aspect of S. 2521.

On a related matter, both bills make it clear that the appellate procedures under the UCMJ provide the sole forum under Title 10, United States Code, for review of the legality of courts-martial. When Congress established the UCMJ in 1950, it provided a comprehensive system for judicial review of court-martial proceedings. Cases in which the approved sentence involves a punitive discharge, death penalty, or confinement for one year or more, are subject to review by the Court of Military Review, a tribunal in each Service comprised of senior judge advocates (10 U.S.C. § 866). Such cases are subject to further review by the United States Court of Military Appeals, an independent tribunal composed of three civilian judges (10 U.S.C. § 867). Cases involving lesser sentences or which are not appealed are reviewed automatically by a judge advocate (10 U.S.C. § 864, as proposed), and are subject to further review in the Office of the Judge Advocate General (10 U.S.C. § 869). In addition, the President and the Secretaries of the Military Departments may take action on a case under the President's constitutional authority and 10 U.S.C. §§ 871, 874, 875.

Several other provisions of title 10 of the United States Code have led to unnecessary duplication in the procedures for review of courts-martial. The Boards for Correction of Military/Naval Records (BCMRs) are empowered to correct "any military record" (10 U.S.C. § 1552). The Discharge Review Boards (DRBs) may change any discharge or dismissal other than a separation by order of a general court-martial (10 U.S.C. § 1553). Under these provisions, the BCMRs have acted on a variety of court-martial cases, and the DRBs have acted on punitive discharges resulting from special courts-martial.

The BCMRs and DRBs were established at the close of World War II, prior to enactment of the UCMJ, to relieve Congress of the burden of correcting military records through the passage of private bills. The members of these boards generally are laymen who have no judicial training. The primary purpose of the boards involves review of routine administrative records. They have extremely large caseloads, with neither the time nor the expertise for the judicial review of courts-martial. Because the UCMJ provides a comprehensive system for appellate review and post-conviction relief, there is no need for these boards to be involved in the issues of law concerning the court-martial process.

It is the position of the Department of Defense that these boards do not have the power to alter the judgment of a court-martial. This was emphasized in the recent amendments to DOD Directive 1332.28, "Discharge Review Board (DRB) Procedures and Standards," approved by the Deputy Secretary of Defense on August 11, 1982, which makes it clear that the Discharge Review Boards are not empowered to rule on the legality of actions that are subject to review in other tribunals (e.g., courts-martial). The sole function of these boards is to take action in the nature of clemency. This may relieve an individual of certain adverse effects of a court-martial conviction, but it does not disturb the underlying judgment.

The amendments will underscore the stature of the Court of Military Appeals and the Courts of Military Review. It would be inconsistent with the dignity and respect that these courts have earned for the military justice system to suggest that their decisions on issues of law could be reversed by an administrative board.

The proposed legislation would make it clear that the BCMRs and DRBs have no authority to review the proceedings, findings, or sentences of courts-martial. This will have the effect of channelling all appellate proceedings and claims for post-conviction relief into the avenues established for such actions by Congress in the UCMJ.

Pre-UCMJ cases may be reviewed on issues of law by The Judge Advocate General under Article 69; post-UCMJ cases that were subject to Court of Military Review jurisdiction may be reviewed by the Courts of Military Review or the Court of Military Appeals on writs of coram nobis; post-UCMJ cases that were not subject to UCMJ jurisdiction may be reviewed by The Judge Advocate General under Article 69. This will not only eliminate an unnecessary duplication of procedures, it will also ensure that post-conviction challenges by the accused will be heard in a judicial forum.

To the extent that other military records are based on the results of trial by court-martial, existing procedures would be available to insure that records are corrected to reflect any change in the court-martial record that results from review under the UCMJ. The BCMRs would still retain their authority to correct such collateral records to reflect final action under the UCMJ.

Our bill will permit the BCMRs to retain the authority to act on court-martial sentences as a matter of clemency (after exhaustion of remedies under the UCMJ). S. 2521, which restricts the BMCRs to changing a discharge or dismissal, is too limited in that regard. There may be other aspects of the court-martial sentence, which, as a matter of clemency, should be changed, and there is no need to preclude the BCMRs from doing so.

Because the BCMRs will have the full power to change discharges and dismissals as a matter of clemency, there is no need to burden the DRBs with this function. In recent years, the DRBs have reviewed more than 20,000 discharges per year. Most of these are adminisrative discharges. Eliminating the requiremen to review discharges issued by courts-martial will enhance the ability of the DRBs to review more expeditiously applications from former members with respect to administrative discharges.

I. *Effective date of the proposed legislation*

A six month period, as proposed in S. 2521, may be too short for an implementation period. After the legislation is enacted, numerous amendments will be required to the Manual for Courts-Martial. A number of these amendments, particularly those dealing with the convening authority's post-trial consideration of the case and related matters, will involve important new rules. These amendments must be drafted by the Working Group of the Joint Service Committee on Military Justice, reviewed and approved by the Joint Service Committee, reviewed by the Code Committee, and made available for public comment. The amendments are then forwarded to the General Counsel for staffing with all DoD Components. After approval within the Department of Defense, the amendments will then be transmitted to OMB for inter-agency coordination (i.e., with the Departments of Justice and Transportation). After that step is completed, the amendments are forwarded to the President for his consideration. This is a long process, with the likelihood of substantial revision along the way, particularly in the initial stages. The process of coordination is beneficial, in that it promotes careful consideration prior to enactment, but it also means that implementation cannot be rushed. Moreover, it is important that Presidential approval occur at least a month before the effective date in order to ensure timely distribution to the field. Under these circumstances, six months is too short a period. We favor the eight month period in our bill.

Our bill also makes it clear that the DRB and BCMR reviews conducted after the date of enactment before the effective date may extend only to matters of clemency or to correct a record to reflect the actions of reviewing authorities under the UCMJ, and may not include a review of the legality of UCMJ proceedings.

III. ADDITIONS MADE BY OUR BILL

Section 3 of our bill contains amendments concerning the designation of court members, military judges, and counsel. The changes made in this regard are intended to facilitate the administration of the court-martial system without affecting the fundamental rights of the accused or the duties of commanders, counsel, court members, and the military judiciary. It is the purpose of this section to reduce the potential for jurisdictional error. For example, a general court-martial must be composed of a military judge, qualified counsel, and at least five members selected by the convening authority under Article 25 (subject to a request for trial by judge alone under Article 16). However, a defect in the designation or excusal of personnel that does not undermine the convening authority's responsibility to select the members who actually sit, or the accused's right to be represented by qualified counsel before a qualified judge, should not affect the jurisdiction of a court-martial. Most aspects of the administrative procedure for assignment or excusal of counsel, members or a military judge (e.g., Secretarial regulations governing the administrative designation of personnel) do not affect the basic composition of the court-martial. Such errors, under this proposal, will be tested solely under the prejudicial error standard of Article 59.

A. *Excusal of members from the court-martial*

Under current case law, there is substantial doubt as to whether the convening authority may delegate the authority to excuse members. *United States* v. *Colon*, 6 M.J. 73 (C.M.A. 1978); *United States* v. *Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States* v. *Newcomb*, 5 M.J. 4 (C.M.A. 1978); *United States* v. *Flowers*, 7 M.J. 659 (A.C.M.R. 1979). *See also United States* v. *Allen*, 5 C.M.A. 626, 18 C.M.R. 250 (1955). Clear authority for such delegation is necessary to eliminate an unnecessary administrative task that now burdens busy commanders. The current system can produce delays in courts-martial, with the attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel. Delays are caused by difficulties involved in securing the personal approval of the convening authority for excusal of a member who, because of last minute difficulties, is unable to attend the court-martial. These problems are significant in peacetime. In a combat environment they would be even worse, as the convening authority frequently would be distant from the location of the court-martial, means of communication would be extremely limited, and more pressing duties would demand his time. At the same time, in a combat environment, the need to excuse members, particularly for last minute exigencies, is likely to be more frequent. Our amendment to Article 25(d) will permit the convening authority to delegate the power to excuse members to his staff judge advocate, legal officer, or other principal assistant. The Manual for Courts-Martial will place reasonable limits on delegation of excusal authority to ensure that the convening authority does not avoid his primary responsibility for the selection of members.

A related problem involves excusal of members after the court-martial begins. Currently, only the convening authority may excuse members for good cause following assembly. The convening authority needs such power in order to discharge his responsibilities as a commander, because there are circumstances in which he may decide that a member is needed to perform important duties elsewhere. However, the current system can produce delays in courts-martial, with the attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel. The military judge is well situated to determine whether good cause exists for excusing a member after assembly. "Good cause" under Article 29 has been construed to mean military exigency, and does not include temporary inconveniences or absences which are incident to normal conditions of military life. Manual for Courts-Martial, ¶ 37*b*. Good cause for an excusal must be shown on the record. *United States* v. *Greenwell*, 12 C.M.A. 560, 31 C.M.R. 146 (1961); *United States* v. *Boysen*, 11 C.M.A. 331, 29, C.M.R. 147 (1960).

B. *Designation of military judges and counsel*

The case law presently requires the convening authority personally to detail the military judge and counsel. *See United States* v. *Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States* v. *Newcomb*, 5 M.J. 4 (C.M.A. 1978). Selection of the military judge and counsel need not require the personal attention of the convening authority. Military judges are not assigned to the convening authority, but to The Judge Advocate General or his designee. Trial counsel and defense counsel are not necessarily assigned to the convening authority's command; rather, the assignment of counsel is subject to regulations of the military department in accordance with the differing needs and missions of each service. Even where the trial counsel and defense counsel are assigned to the convening authority's command, the convening authority rarely exercises personal discretion in the selection of counsel without obtaining and following the recommendation of his staff judge advocate.

The present requirement that the convening authority personally detail each military judge and counsel, as well as any substitutions, creates a substantial burden on busy convening authorities. Moreover, courts-martial are occasionally delayed because the convening authority is unavailable to approve a necesssary substitution of a military judge or counsel.

The proposed legislation would amend Article 26 with respect to military judges and Articles 27 and 38 with respect to counsel in order to facilitate the assignment of personnel to the court-martial. Because the legal offices of the various services are organized differently, the procedures for detail of military judges and counsel is left to Secretarial regulations and The Judge Advocate General concerned. The Manual for Courts-Martial will provide general guidance, including procedures for including in the record appropriate documentation concerning the assignment of military judges and counsel to the specific case. With respect to the assignment of judges, the authority will be vested in The Judge Advocate General. Each service has an independent judicial structure in accordance with Article 26(c). Under the proposed legislation, authority to detail military judges could be delegated and subdelegated through the judicial structure according to the organization and needs of each service's judiciary.

C. *The Code Committee*

As I noted in my introductory remarks, the Code Committee performs an extremely valuable function by surveying the operation of the UCMJ and reviewing proposed amendments. Under Article 67 of the current law, the Code Committee consists of the Judges of the Court of Military Appeals, The Judge Advocates General of the Military Departments, and the General Counsel of the Department of Transportation. At present, the Director, Judge Advocate Division, Headquarters, U.S. Marine Corps sits as an unofficial member of the "Code Committee". Our bill would establish a formal basis for his participation. For the same reason, our bill substitutes the Chief Counsel, United States Coast Guard, for the General Counsel of the Department of Transportation, as member of the Code Committee.

D. *Supreme Court Review*

Our bill corrects a serious deficiency in the present system, under which the appellate process is not subject to direct review in the Supreme Court. At present, court-martial convictions are reviewed in the federal courts only through collateral proceedings such as a petition for habeas corpus filed in the federal district courts by the accused. There is no statutory authority for decisions of the Court of Military Appeals adverse to the government to be reviewed in the federal courts.

For the accused, the absence of direct review by the federal courts leads to "a judicial trek that has been criticized as inefficient, costly, time-consuming, and redundant."[1] If, for example, the accused in a general court-martial receives a sentence that includes a punitive discharge, there is legal review by a judge advocate in the field, appeal to a Court of Military Review, and the opportunity to petition for review by the Court of Military Appeals. The accused then is faced with a complex array of options for mounting collateral attack in which the opportunity for obtaining review and the scope of review can differ considerably depending on the court in which review is sought and the nature of the remedy sought. The doctrine of exhaustion of remedies may require the accused to pursue further actions in the military system prior to obtaining review in a federal district court.

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[1] H. Moyer, Justice and the Military, 1182 (1972).

Even if relief is obtained at the district court level, there is the likelihood of further review by a court of appeals. The situation is complicated by the procedural aspects of federal court review. Moreover, the substantive treatment of the case may vary not only among the courts of appeal but also within particular circuits.

For the government, on the other hand, there are no complex choices to be made. If there is a determination adverse to the government in the Court of Military Appeals, there is no other tribunal to which the government can appeal. This leaves the government at a very substantial disadvantage. The absence of direct review in an Article III court is of particular concern because of the nature of the issues decided adversely to the government by the Court of Military Appeals can have a substantial effect on the state of discipline in the armed forces. To correct this deficiency, the legislation will permit discretionary review of decisions of the Court of Military Appeals by the Supreme Court through writs of certiorari.

We have been sensitive to the importance of controlling the volume of cases presented to the Supreme Court. Although the general formulation for Supreme Court jurisdiction over other courts normally involves review of all cases within the lower courts' jurisdiction, the Department of Justice recommended that Supreme Court jurisdiction over military cases be limited to cases actually considered by the Court of Military Appeals, thereby precluding direct Supreme Court review in cases where the Court of Military Appeals declined to exercise its discretionary jurisdiction. The Department of Justice offered the following rationale: "The propos[al] . . . would permit appeal in a circumstance in which a decision of the Court of Military Appeals affected military jurisprudence. To limit direct appealability in such a way would permit the Supreme Court to consider issues of public importance but would preserve the role of the Court of Military Appeals as the primary civilian interpreter of the Uniform Code of Military Justice."

The authority for the parties to seek review in the Supreme Court is a natural step in the evolution of the military justice system. Thirty-five years ago, review by civilian tribunals was limited to questions of jurisdiction. The creation of the Court of Military Appeals in 1950, however, institutionalized civilian review of the entire record for errors of law. It has achieved this without creating the uncertainty and lack of uniformity that would have resulted if the pressure for civilian review had led to greater intervention by the lower federal courts by way of collateral challenges. The Court of Military Appeals regularly interprets federal statutes, executive orders, departmental regulations, and determines the applicability of constitutional provisions to members of the armed forces. The decisions of the Court are of considerable importance to our nation because they impact directly on the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system.

I cannot emphasize too strongly that our interest in Supreme Court review does not reflect dissatisfaction with the Court of Military Appeals or with the general tenor of its decisions; rather, the very success of the Court in institutionalizing civilian review has called into question the basis for excluding review by the Supreme Court. As much as I'd like to think that we would always agree with the decisions of the Court of Military Appeals, it is inherent in the creation of an independent tribunal that there will be differences—sometimes significant differences—between the Court and its litigants. In our federal system, the most appropriate forum for resolving such disputes, particularly with respect to interpretation of the Constitution, is the Supreme Court.

I would also like to add that it is not our intention to displace the Court of Military Appeals as the primary interpreter of military law. In a typical year, less than 300 decisions of the Court will be eligible for the submission of petitions for certiorari. The Solicitor General will insure that the government only seeks review in occasional cases of great importance. It is unlikely that the Supreme Court will grant review at the behest of the accused in a substantial number of cases. In such circumstances, the Court of Military Appeals, like the highest court of a state, will be the principal source of authoritative interpretations of the law.

IV. ADDITIONAL CHANGES PROPOSED BY S. 2521

A. *Confinement powers of special courts-martial*

S. 2521 would permit a special court-martial, which presently is limited to adjudging confinement not in excess of six months, to adjudge confinement of up to one year. We support this amendment. Under current law, the punishment that may be adjudged by a special court-martial (6 months confinement) is the equivalent of a punishment for a "petty offense" in the federal civilian sector. 18 U.S.C. § 1(3). A special court-martial cannot impose one year's confinement, the punishment provided by federal civilian law for misdemeanors. 18 U.S.C. § 1(2). It is ironic that a U.S. magistrate can impose confinement for one year, but a special court-martial, composed of a military judge and, where not waived by the accused, three members cannot impose confinement greater than 6 months.

Available data suggest that a significant number of cases are referred for trial by general courts-martial, which have no punishment limitations, because present ceilings on punishment that may be adjudged by a special court-martial are too stringent. This not only means a greater burden for the government, in terms of the requirement for an Article 32 pretrial investigation and a greater number of persons sitting on the court (a minimum of 5 members for a GCM, 3 members for a special court-martial), it also presents the accused with a risk of substantial confinement, limited only by the maximum punishment for the offense, which may be a period of many years.

Air Force data provide the following information in support of this proposal:

The Air Force mix of special and general courts-martial for calendar years 1977 through 1982 (as of 28 May 1982) was 1,222 general and 5,647 special courts-martial, for a total of 6,869 trials (including only cases that proceeded to sentencing). Thus, 18 percent of their special and general court-martial trials have been by general courts-martial.

In those trials by general courts-martial, 54 percent (665 of the 1,222 cases) resulted in sentences that could have been imposed by a special court-martial if its jurisdiction included confinement for 1 year. This suggests that use of the more expensive and more risky (to the accused) general court-martial could be reduced considerably by this amendment.

The results of special courts-martial also suggest a need for increasing the sentencing power of such courts. In the 5,647 special courts-martial examined (CY 1977 through 1982 as of 28 May), 275 sentenced the offender to a bad-conduct discharge and 5 or 6 months of confinement—almost or at the maximum, and 849 sentenced the offender to confinement for 5 or 6 months, with or without a bad-conduct discharge. (i.e., 15 percent of the sentences had 5 or 6 months' confinement regardless of whether a BCD was imposed). We regard this as a significant finding, particularly when we consider the psychology of sentencing which generally leads a court to impose something less than the maximum punishment.

The special court-martial, with its six-month limit, was created in 1913 to add an intermediate forum between minor tribunals that had fallen into disuse and the unlimited powers of a general court-martial. In view of the substantial procedural protections added to military law since that time, an increase in the sentencing power of this intermediate court to one year—the power of a federal magistrate's court—does not harm the original intent. In 1913, special courts-martial consisted of three lay officers, without the participation of judge advocates. Today, a special court-martial empowered to adjudge a bad-conduct discharge, must have legally qualified defense counsel, and a military judge must preside except in the most limited circumstances. The rules governing special courts-martial give the accused virtually every protection afforded a civilian defendant in a federal trial, and in many respects, provide him with greater rights (e.g., discovery).

We recommend that the protections afforded an accused when a bad-conduct discharge is adjudged by a special court-martial (legally qualified counsel, presence of a military judge, preparation of a complete record, and the opportunity to appeal to a Court of Military Review) apply when confinement is for more than six months. We would also recommend that the opportunity to appeal to a Court of Military Review be available in any general court-martial where the sentence is confinement for more than six months. Congress has provided these protections in special courts-martial resulting in a bad-conduct discharge, recognizing that there is a qualitative difference between a punitive discharge and a brief period of confinement. Likewise, there is a qualitative difference between what the civilian sector labels as a "petty offense" (six months confinement) and a misdemeanor (one year's confinement), and this should be reflected in the conforming amendments.

B. *Sentencing by the military judge in all noncapital cases*

S. 2521 would amend Articles 16, 26, and 51 to authorize the military judge to adjudge the sentence in all noncapital cases, even when the members decide the issue of guilt or innocence. We have considered the proposal most thoroughly and I have discussed the subject at length with all three Judge Advocate Generals. Frankly, there is disagreement amongst them as to the desirability of the proposed change. In the circumstances, I have been unable to conclude that requiring judge-alone sentencing in all non-capital cases will not jeopardize important principles of military law involving participation of officers in critical aspects of military discipline nor deprive the accused of an option that he now enjoys under our system and has not abused. Accordingly, we would recommend that this proposal be subjected to further study and analysis, and that the committee defer action on it until that study has been done.

C. *Suspension of the sentence by the military judge*

S. 2521 would create a new Article 57a to authorize the military judge to suspend the sentence of the accused for up to two years. Under current law, the court-martial may not adjudge a suspended sentence. We do not favor any change in current law. Suspension is solely a post-trial power of the convening authority, the Service Secretary, and the President. We have not found any significant problems in the operation of the current system. Although a comparison to the civilian sector suggests support for the suspension power, the analogy is not appropriate. Unlike their civilian counterparts, military judges have no supervisory role over persons serving a suspended sentence or those who administer probation. Adherence to the civilian model would violate a fundamental principle of management, that authority should follow responsibility. In the military, the commander is accountable for the effects of further misconduct by a persons serving a suspended sentence. The commander is in the best positions to assess the danger to discipline and order in the command posed by a person convicted of a crime who remains in the service under a suspended sentence. Moreover, suspension of a sentence is a means of recovering the services of a member of the armed forces. Only the commander can assess adequately whether suspension will be effective from a manpower management perspective.

D. *Qualifications of judge advocates*

S. 2521 would amend Article 6 to require judge advocates to be members in good standing of the bar of a Federal court or the highest court of a State or territory at the time of performing any duties as a judge advocate under the UCMJ.

We do not object to the principle espoused in this provision, but we have questions as to the need for it and for the manner in which it is drafted. Each service maintains an active professional responsibility mechanism to insure that all judge advocate activities. It is not clear what effect, if any, this amendment would onto active duty.

Article 27 presently requires that all detailed counsel in general courts-martial, and most counsel detailed in special courts-martial, be either a member of the bar or a graduate of an accredited law school (the military departments traditionally have required bar membership) and that the counsel be certified as competent by The Judge Advocate General. No specific problems have been identified that would warrant further legislative action.

The phrase "no person may be assigned any duty to be performed by a judge advocate" is troublesome because specific articles of the UCMJ permit the use of laymen (e.g., assistant trial counsel under Article 38(d)). In addition, the military departments, in conformity with legal practice in the civilian sector, are making increasing use of paralegal assistants to increase the effectiveness of judge advocate activities. It is not clear what effect, if any, this amendment would have on those developments.

We also are concerned about the impact on courts-martial of developments affecting bar memberships that are unrelated to professional competence. For example, bar membership could be affected by continuing legal education requirements on subjects of importance to a state bar that are unrelated to military practice. In this regard, it is noteworthy that a judge advocate who maintained multiple bar memberships would be unaffected by the legislation if he or she should terminate membership in the bar of one state as a result of such requirements, but a judge advocate who maintained membership in only one state bar would be affected by such a requirement. The problem could be particularly acute if the disqualification, although having nothing to do with the competence of the judge advocate, occurred in the midst of representing a client under the UCMJ. We do not think that the practice of law within the military justice system should be subject to the vagaries of state bar membership requirements without the flexibility to take into account the circumstances of individual cases.

As an alternative to the legislative proposal, we could set forth a flexible provision in the Manual for Courts-Martial, requiring current bar membership for persons assigned to duty as judge advocates unless The Judge Advocate General found extenuating circumstances. This would not affect the performance of authorized duties by lay officers, and would insure monitoring of professional qualifications by The Judge Advocate General without undue restrictions.

E. *Peremptory challenges*

Each party has one peremptory challenge under current law. S. 2521 would amend Article 41 to give each party three peremptory challenges. We do not favor any change in current law.

If the number of peremptory challenges were increased to three per party, the convening authority would be required to detail six more members than now required to every court-martial to avoid having the membership reduced below its statutory quorum by the challenge process. This would be contrary to the goals of the bill in Article 19, to promote the use of special court-martial. We also note in this connection the policy at paragraph 62h(2) of the "Manual for Courts-Martial" that courts-martial "should be liberal in passing on challenges [for cause]." In a special court-martial we frequently see more than five members detailed so that the existing two peremptories and one challenge for cause can be sustained before the court-martial is reduced below quorum. In a general court-martial, the number is at least seven. If the proposal were enacted, 10 and 12 members would have to be detailed to special and general courts-martial, respectively, to reach the same result. In each case, that means that at least six commissioned officers would be unavailable for their primary missions.

We regard increased peremptories as unnecessary in military practice. Our "blue ribbon" juries are widely known for their quality. Since the court-martial will be composed of commissioned officers unless an enlisted accused requests otherwise, we can draw some important conclusions about the military "jury": It is composed of responsible, well-disciplined persons who are accustomed to important decisionmaking and following difficult instructions and who normally have college educations. The members are selected in compliance with the statutory criteria under Article 25(d)(2): age, education, training, experience, length of service, and judicial temperament. These considerations militate against the need for increasing the number of peremptory challenges at the cost of reducing the command's available manpower.

F. *Service of process*

Process issued in courts-martial under Article 46 is similar to that issued in United States district courts. The Department of Justice has directed U.S. Marshals to execute such process. S. 2521 would amend Article 46 to provide express statutory recognition of current practice. We have no objection to this amendment.

The use of subpoenas is fairly limited in military practice. Military witnesses are compelled to appear and testify when necessary by military orders—no subpoena is necessary or used. Most civilian witnesses appear voluntarily. In such cases a subpoena is used only to make available to those witnesses reimbursement for their expenses, and so the subpoena is not served; it is simply mailed or handed to the witness. The amendment would not remove the authority that the military now has to serve the subpoena on a reluctant civilian witness with military personnel. Thus, this bill affects only a small number of transactions: those in which the witness is civilian, does not wish to appear, must be compelled, and cannot be served easily by military personnel. At the present time, we have the cooperation of the U.S. Marshals and have experienced no problems in this regard.

G. *Waiver of the pretrial investigation*

Court of Military Appeals has held that the accused may waive the pretrial investigation that is otherwise required by Article 32. *U.S.* v. *Schaffer*, 12 M.J. 425 (C.M.A. 1982). We have no objection to the amendments to Articles 32 and 33 in S. 2521 that would provide express statutory recognition of the waiver. In this regard, we note that although accused may waive the investigation, he may not compel the commander to forego the requirements of Article 32 if the commander deems it appropriate to refer the case for a pretrial investigation.

H. *Defense counsel's post-trial duties*

Article 38 presently authorizes the defense counsel to submit a brief for attachment to the record. S. 2521 amends this to authorize the defense counsel to assist the accused in submitting matters to the convening authority, and to take other unspecified actions subject to Presidential regulations. We do not support the amendments made by S. 2521. It is not necessary to state in the UCMJ that the post-trial duties of the counsel include assisting the accused in submitting matters for consideration by the convening authority, or to state that the defense counsel may be required to perform other (unspecified) acts subject to Presidential regulation. Although the present version of Article 38(c) is needed to provide authority to attach matter to the record, there is no need for statutory basis to permit defense counsel's participation in the post-trial procedure in view of the proposed Article 60, which expressly permits the accused to submit matter to the convening authority. As to the requirement to perform other unspecified actions, this authority is not needed in view of the President's power to prescribe rules governing post-trial procedure under Article 36.

I. *Items related to the Court of Military Appeals*

S. 2521 would modify the retirement system for judges of the Court of Military Appeals. We support fair and equitable retirement benefits for members of the Court, but defer to the Judges of the Court on the details of the retirement system.

J. *Controlled substances*

S. 2521 would establish a new punitive article dealing with controlled substances. We agree with the general principles on this matter set forth in S. 2521, and we appreciate the deep and continuing support that this Subcommittee has provided in our efforts to eliminate drug abuse.

The specific article on drug abuse, however, is unnecessary. In 1981 the Joint-Service Committee on Military Justice considered drafting a proposal similar to concept to S. 2521. That Committee's conclusion was that a statutory provision would likely be too cumbersome to be effective. As a result, that Committee designed a change to the Manual for Courts-Martial by Executive Order describing a uniform and simple system for punishing drug offenses under Article 134. The Executive Order has been fully staffed and has the support of the military services and all DOD components. It has been forwarded to the President for approval.

The Executive Order is significantly different from the approach taken by S. 2521. S. 2521 relies solely on the schedules of controlled substances at 21 U.S.C. § 812 and 21 C.F.R. to list prohibited substances. This makes an element of proof of the offense that substance alleged is in fact listed in one of those schedules. That, in turn, requires that we supply every office dealing with this kind of offense with a current copy of that volume of the Code of Federal Regulations containing title 21, sections 1300 and following. We would also be required to provide an updating service requiring daily review of the Federal Register. These are cumbersome and expensive costs of administration when the present system will work very well as refined by the pending Executive Order.

The military needs the greatest possible flexibility and the simplest possible tools for dealing with the large volume of cases we are prosecuting as part of our aggressive effort to rid the services of persons who traffic in illegal drugs.

The Joint Service Committee resolved this problem by naming in the Executive Order the most frequently abused drugs as specifically prohibited, without reliance on the schedules. It then relies on the schedules only to prohibit other, much less frequently abused substance. Thus, it will rarely be necessary to consult the schedules under the approach taken in the Executive Order. In those few cases in which it is necessary to consult the schedules, we can afford the time necessary to send copies of the pertinent authorities to our field agencies. We could not take that approach in each of the drug cases we prosecute under the UCMJ.

In drafting the Executive Order, the Committee streamlined the prohibitions of 21 U.S.C. § 801 et seq. to make them suitable for use by lay persons, on whom the services must rely in punishing drug offenses under Article 15 by nonjudicial procedure and on whom some commanders must rely when drafting charges in all cases.

We also are concerned that the approach taken in S. 2521 with respect to punishments would disrupt a tradition of very long standing by which the authority to fix maximum punishments is left to the President. The traditional system builds flexibility into the UCMJ and avoids the need to frequently return to the Congress for amendments.

This concludes my prepared statement. I shall be pleased to answer any questions you may have either at this time or at the conclusion of the statement by the representatives of the armed forces.

Senator JEPSEN. General Clausen?

STATEMENT OF MAJ. GEN. HUGH J. CLAUSEN, USA, THE JUDGE ADVOCATE GENERAL OF THE ARMY

General CLAUSEN. Thank you, Mr. Chairman. I appreciate this opportunity to discuss some of these matters with the subcommittee. I appreciate the interest that the committee has had in the administraion of military justice.

In particular I might add that your efforts have improved the system. We think it works well, that it is fair, but some efficiencies can be improved upon and I believe that Mr. Taft has mentioned those.

I would agree with the things that Mr. Taft has spoken to here today. I would like to address a couple of matters, one of which you mentioned, Mr. Chairman, and that is certiorari to the Supreme Court.

I have no quarrel with that position from a purely philosophical point of view, but I think there are some practicalities that you might wish to consider. I believe that there are very few cases that reach the Supreme Court, whether through the efforts of Government or the accused. However, there are a number of things that I don't believe we have studied adequately, at least in my personal view.

There are different rules of practice before the U.S. Supreme Court and before the Court of Military Appeals even for such things as printing of the brief. I believe that the Government would be as a matter of fact perhaps at a bit of a disadvantage in that before the Government can even ask for certiorari it must go through the Solicitor General.

The accused, on the other hand, would have no such restraint. I believe that experience tells us that there would be a number of applications which, while they would not significantly increase the workload of the Supreme Court, would, I believe, increase the workload of the services. That is a matter that I would suggest we should study a bit.

Other than that I believe that I would agree with all of those things that Mr. Taft has spoken to. I will of course be happy to answer any questions.

[The prepared statement of Maj. Gen. Hugh J. Clausen follows:]

PREPARED STATEMENT OF MAJ. GEN. HUGH J. CLAUSEN, THE JUDGE ADVOCATE GENERAL, UNITED STATES ARMY

Mr. Chairman and members of the committee, I am Maj. Gen. Hugh J. Clausen, the Judge Advocate General, Department of the Army. It is my privilege to provide the views of the Army on S. 2521, proposed legislation to revise certain provisions in the Uniform Code of Military Justice and to amend two other statutes in relation to military justice. At this point, I would submit a written text of my remarks for inclusion in the record.

I appreciate the interest of this Committee in military justice, and, in particular, Mr. Chairman, your efforts to improve the military justice system. The Military Justice Amendments of 1981 resolved several problems in military justice. The proposed legislation before this Committee would further improve the efficiency of the administration of military justice and thereby enhance discipline. At the same time, it would maintain, or extend, the protections now afforded the accused in courts-martial.

I concur in the remarks of the General Counsel, Department of Defense. I would like to address a few matters in greater detail.

I. ARTICLES 25, 26, 27, AND 29

The amendments of Articles 25, 26, 27, and 29 would remove the requirement that the convening authority personally detail military judges and counsel and personally excuse any members for any reason other than a challenge. The manner of detailing counsel and judges would be provided in Secretarial regulations while the Manual for Courts-Martial would provide detailed guidance and limits for delegation of authority to excuse members.

The requirement that the convening authority personally detail counsel and judge in each case imposes an unnecessary burden on busy convening authorities and their staffs. It causes trial delays, and presents an appearance of evil, insofar as it suggests that the convening authority actually chooses the military judge. Because of the evolution of the trial judiciary in each service and the independence of military defense counsel, the convening authority's role in detailing those people has become largely ministerial. Moreover, the current requirement adds paperwork to each case and delays cases when the convening authority—who is, after all, the commander of a brigade, division, post or other large organization—is not immediately available to act on these matters. These problems are burdensome, disruptive, and wasteful in peacetime. In combat they would seriously impede the administration of military justice and would interfere with vital combat missions.

The amendments concerning members in Articles 25 and 29 have a similar purpose. These changes do not remove from the convening authority the responsibility for selecting members. That is a function which must be performed by the commander. Once he has done so, however, it is not necessary that he personally excuse a particular member in a given case when, for example, the member is ill, or military exigencies arise. Under the proposed legislation, this responsibility could be exercised before assembly by a staff judge advocate or principal assistant, such as the deputy commander. After assembly the military judge could excuse members. Again, this avoids disruption and delay when there is an obviously sound reason for excusal and the convening authority is not immediately accessible. Inaccessibility will be an acute problem in combat when convening authorities are commanding units in battle, minimizing radio and other communications. The need to excuse members then will be even more frequent.

II. ARTICLE 34

The proposed amendment of Article 34 will simplify the procedures for referral of charges to a general court-martial, while better protecting the accused against unwarranted referral of charges. Article 34 currently requires that before charges may be referred for trial by general court-martial, the convening authority—who is not a lawyer—must find that each charge states an offense and is warranted by the evidence. Before making that decision, the convening authority must receive legal advice from the staff judge advocate. The staff judge advocate's advice has become a legal brief which can run from a few pages in length in simple cases, to scores of pages in more complicated ones. This takes the time and resources of lawyers, staff, and, most importantly, the commander. The amendment of Article 34 removes the requirement that the convening authority examine the charges for legal sufficiency, and puts that burden where it belongs—on the shoulders of the staff judge advocate—who is a lawyer. No case may be referred to a general court-martial, under the proposal, unless the staff judge advocate finds that the charges state offenses, are warranted by the evidence, and are subject to the jurisdiction of a court-martial. The convening authority however, retains the final power to decide whether to prosecute by a general court-martial, but he can exercise this power only after the staff judge advocate has made the required findings. This is a more appropriate and efficient apportionment of responsibilities.

III. ARTICLE 60

The amendment of Article 60, together with changes to Articles 63 and 64, will remove from the convening authority the responsibility to review the findings and sentence for legal sufficiency. This review by the convening authority is unnecessary in view of the many other layers of review in the system. Similar to the pretrial advice under Article 34, the requirement for legal review by the convening authority, after advice by the staff judge advocate, has resulted in a blizzard of paperwork—staff judge advocate reviews have been known to run into hundreds of pages, and on a few occasions have been longer than the record of trial. All of this effort is more appropriate at the appellate level. The present system delays posttrial processing of a case, and consumes legal resources and commanders' time without substantial benefit to the accused or the Government. The legislation, by eliminating these requirements, would leave legal review of the case to the Courts of Military Review, the Court of Military Appeals, and the Judge Advocates General. At a minimum, however, each case not reviewed by a Court of Military Review will be reviewed by a local judge advocate. Note that the convening authority retains authority to disapprove findings of guilty and to reduce or disapprove the sentence as a matter of clemency or command prerogative. Thus the accused does not lose the benefit of possible favorable action at this level—only a superfluous legal review.

IV. APPEALS

The proposed legislation would amend Articles 61 through 66 and Article 69 to revise the appellate process.

The amendment of Article 62 will parallel 18 U.S.C. section 3731 by authorizing appeals by the Government of certain adverse rulings by the trial judge, such as rulings on motions to suppress evidence or to dismiss charges. As in Federal courts, the military justice system should provide an avenue for the Government, as well as the accused, to seek reversal of legal error at the trial level, consistent with judicial economy and double jeopardy protections.

The other amendments concerning appellate matters will streamline the review process. They will eliminate all automatic appeals, except in capital cases. An accused who asks for apellate review will still receive the same thorough review by the Court of Military Review, and will have the opportunity to petition the Court of Military Appeals as he does now. S. 2521, also provides for certiorari and review by the Supreme Court. Under the proposed legislation, the accused may waive appellate review. The accused will have been advised of his appellate rights by the military judge, under the proposed amendment of Article 53, and will have counsel, before he affirmatively waives this right. Mere failure to file a notice of appeal, unlike the provisions in S. 2521, will not constitute waiver. This procedure parallels procedure for appeals in criminal cases in Federal courts and in virtually every state. It will eliminate the requirement for a verbatim record and appellate review when the accused says he doesn't want it. This will conserve resources for those cases where review is requested, and allow cases in which appeal is waived to be finalized much more quickly. Note that even if the accused waives appeal, the case would still be reviewed locally by a judge advocate before it would be final.

The proposed legislation also provides for en banc reconsideration by the Courts of Military Review of decisions by single panels and provides authority for the Judge Advocates General to correct errors in certain cases forwarded to them under Article 69. Currently the Judge Advocate General must forward to the Court of Military Review certain cases in which he finds an error; he cannot correct it himself. This is a time consuming process, which causes delays including delays in other cases awaiting appellate review.

Finally, the legislation would amend 10 U.S.C. sections 1552 and 1553 to eliminate review of court-martial convictions by the Discharge Review Board and Boards for Correction of Military Records. Such review is redundant in view of the extensive review provided under the Uniform Code of Military Justice. The Boards for Correction of Military Records would retain authority to act on court-martial sentences as a matter of clemency.

CONCLUSION

In summary, let me make clear that the military justice system today is professional, respected, fair and effective. The revisions in the proposed legislation will not take away the rights of the accused or significantly change the way cases are tried. The changes proposed will eliminate some procedures which have outlived their usefulness because of the development of the current trial and appellate judicial system. The amendments will more closely conform military appellate procedure to that in Federal criminal cases. Of particular importance, they will reduce many administrative burdens and inefficiency connected with the pre and posttrail processing of a case in the field, and eliminate the requirement that commanders peersonally perform tasks which could easily be done by others. They will not, however, interfere with the commander's ability to ensure that good order and discipline are maintained or diminish the fundamental rights of an accused. These changes will be vital in a combat environment.

I thank the Committee for this opportunity to testify on these matters and I will be happy to answer questions you may have.

Senator JEPSEN. Thank you.

General Bruton?

STATEMENT OF MAJ. GEN. THOMAS B. BRUTON, USAF, JUDGE ADVOCATE GENERAL OF THE AIR FORCE

General BRUTON. Mr. Chairman, I offer my prepared remarks for the record as well.

I do appreciate the efforts and time that this committee has devoted to examining possible amendments to the UCMJ and your interest and concern with changes to the Uniform Code of Military Justice during this session of Congress.

The military justice system and the Uniform Code of Military Justice both have a long history. The Uniform Code is short, and it is well thought out. It has worked and I submit that it is working. Therefore, I believe it is important that any major substantive changes to the UCMJ be considered very carefully.

Possibly a philosophical point is that I believe we should continue to insure that "military" stays within the Uniform Code of Military Justice. The perception is that the military justice system has been separate from the civilian justice system and I believe we should continue to be a separate system.

The military community should remain an integral and vital part of the system. It should not become the exclusive province of lawyers and technicians. The UCMJ supports commanders. Commanders should continue to play an important and very visible role in the system.

Finally, I hope the Uniform Code of Military Justice can be as uniform as possible. I believe this is a reasonable expectation of the public. They would expect their sons and daughters who are service members to be treated in a generally consistent manner.

I will be glad to answer any questions.

[The prepared statement of Maj. Gen. Thomas B. Bruton follows:]

PREPARED STATEMENT OF MAJ. GEN. THOMAS B. BRUTON, THE JUDGE ADVOCATE GENERAL, UNITED STATES AIR FORCE

Good morning, gentlemen. I am Gen. Thomas B. Bruton, The Judge Advocate General, United States Air Force. I appreciate the opportunity to appear in connection with the two bills now before you. The Air Force also appreciates the opportunity provided by Senate bill 2521 and these hearings to explore the opportunities for improvements in the administration of military justice.

Among the many changes that would be made by these two bills are two that the Air Force particularly favors, and four that we do not favor. The witnesses who have preceded me have adequately stated the administration's positions on the many aspects of these two bills; I will confine my remarks to statements on those six parts of particular interest to the Air Force.

The Air Force supports enactment of the provisions that would provide for:

(1) Appeals by the Government from adverse decisions of trial judges; and

(2) An improvement in the responsiveness of the special court-martial by increasing its punishment authority to include confinement for 1 year.

The Air Force does not favor enactment of those parts of Senate bill 2521 which would result in—

(1) Enlargement of the sentencing power of military judges;

(2) Suspensions of sentences by military judges; and

(3) Increased peremptory challenges.

Finally, while we agree with the intent of the specific article on drug offenses, we believe that it is no longer necessary in view of a pending recommendation for a change of similar design to the Manual for Courts-Martial.

The Air Force joins the other witnesses today in support for the provisions to permit the Government to appeal certain adverse decisions of trial judges.

This provision would extend to military practice a procedure very much like that found in Federal civilian practice. Like that procedure, these proposals simply recognize that not all judges are always correct, and that an accused ought not escape trail because of an error of the judge.

The Air Force also supports increasing the jurisdiction of special courts-martial to include confinement for 1 year.

In comparison with the Federal civilian system, the special court-martial is now only a "petty offenses" forum.

The amendment would do no more than make a special court-martial's authority extend to the "minor offense" or "misdemeanor" level.

The present military structure has an unfortunately large gap between its forums. We suspect that many cases are referred for trial by general courts-martial—which have no punishment limitations like those of specials—because the limit on punishments by special courts-martial is too stringent.

The disadvantages of the present structure are, first, that general courts-martial require more complicated and expensive pretrial procedures, and, second, they expose the accused to more severe punishments than may otherwise be warranted, including dishonorable discharge and forfeiture of all pay and allowances. In too many cases, these disadvantages must be suffered solely because of the inadequate sentencing power of special courts-martial.

We analyzed reports of sentences in Air Force courts-martial since 1977 and found that 54 percent of the general courts-martial sentences could have been imposed by a special court-martial if its jurisdiction included confinement for 1 year. Thus, this adjustment could cut our need for general courts-martial in half, all other factors remaining constant.

The 6-month limit has been the law since 1913, when it was added to adjust the system by adding an intermediate forum between the minor forums, which had fallen into disuse, and the unlimited general court-martial. Legislative and Executive improvements in the military justice system now make a new adjustment entirely reasonable. In the Air Force, well-trained judge advocates participate in the administration of military justice at all phases. All services use military judges at all general and special courts-martial. Our counsel have been separated into independent and specialized organizations, and only counsel certified under Article 27 are detailed.

In short, the special court-martial is now a part of a sophisticated criminal law enforcement system, a legitimate forum, with protections comparable to those in most civilian courts, and it should have more appropriate punishment jurisdiction.

As I mentioned, there are three proposals that in our opinion should not be enacted. The first of these is enlarged sentencing power of military judges.

This amendment would eliminate a choice that now puts military accused in a favored position: They now have the almost unqualified right to elect to be tried and sentenced by military judge alone. Our people understand this right, and they use it. However, they show no preference. Our survey of trials that proceeded to arraignment in calendar years 1977 through 1982 showed that the accused elected trial by the military judge in 51 percent.

In our view, an "appropriate sentence" is what the community says it is, not necessarily what a judge says it is. An airman ought to be sentenced by other airmen, by members of his own command and community, because these people are most acutely aware of local conditions and attitudes that affect the determination of an "appropriate sentence." Military judges are usually "circuit riders" now, and they are uniformly lawyers. Military judges are not always in the best position to appreciate the attitudes, problems, and concerns of a local military community.

Commanders command people—not things. They must involve themselves in the entire disciplinary system to the maximum extent possible, consistent, of course, with law and fairness. The good ones want to be involved, and they do not want to be further removed from the process or encouraged to wash their hands of their people or problems. This amendment would, however, further remove them from participation in this most important part of the disciplinary system.

Such measures also impede development of officers who can become commanders. Participation as a court member in both the findings and sentencing phrases of trial is an important part of the development of the skill and knowledge of officers of any grade. Without that experience, they are not as well prepared for command.

This proposal would be a fundamental change in military justice, but we find no pressing need for it. Further study might alter this position. We also note that there is no consensus in support of it. We submit that such a major change ought not be enacted without that need and consensus.

The Air Force also recommends against legislation providing for suspension of sentences by the military judge.

Clemency is not the only consideration in suspending a sentence in military law. Three other important considerations favor leaving this power solely in the hands of command.

Suspension of a sentence is a way of retaining the services of a military asset, an asset that can be managed more effectively by commanders than by judges. Only the commander can adequately assess whether suspension is an effective measure.

Furthermore, only the commander can adequately assess the danger to discipline and order in that command posed by a person convicted but remaining in the command under a suspended sentence. Only that commander can assess the usefulness of the servicemember and the costs of obtaining and training a replacement, if indeed a replacement is even available.

Finally, analogy to other jurisdictions in which a judge may suspend a sentence is inaccurate. Unlike their civilian counterparts, military judges have no supervisory role over persons serving a suspended sentence or those who administer the "probation." To follow the civilian model in the military would violate a fundamental principle of management, that authority should follow responsibility. In the military it is the commander who must be responsible for the conduct of all persons in that command—including a person on suspension—not the military judge. Therefore, that commander should have sole authority to suspend a sentence.

The Air Force does not favor increasing the number of peremptory challenge.

If the number of peremptory challenges were increased to three per party, the convening authority would be required to detail six more members than now required to every court-martial to avoid having the membership reduced below its statutory quorum by the challenge process. In a special court-martial, we most frequently see six members detailed, so that the existing two peremptories and one challenge for cause can be sustained before the court-martial is reduced below its quorum of three. In a general court-martial, the number is at least eight to assure a quorum of five. If the proposal were enacted, 10 and 12 members would have to be detailed to special and general courts-martial, respectively, to reach the same result. In each case, that means that at least four commissioned officers will be unnecessarily unavailable for their primary missions.

We regard increased peremptories as unnecessary in military practice. Our "blue ribbon" juries are composed of court members who are responsible, well disciplined persons, accustomed to important decisionmaking and to following difficult instructions. All but a very few officers and many enlisted members have college educations and professional military education. They are selected in compliance with the statutory criteria: age, education, training, experience, length of service, and judicial temperament. These considerations militate against the need for increasing the number of peremptory challenges at the cost of reducing the command's available manpower.

The Air Force appreciates the goal of the specific article on drug abuse, but we believe that an amendment is not necessary at this time.

The Air Force has also explored the idea of legislation on drug abuse, but we agreed that a statutory provision might be too cumbersome to be effective and too difficult to change if it is. A pending proposed Executive order changing the Manual for Courts-Martial would describe a simple, uniform system for punishing drug offenses under Article 134. It requires no other changes in our practice. It follows the same basic approach taken by the present bill, but it even further simplifies the Federal civilian approach, and—most important—it gives us needed flexibility to deal with new substances, new acts, and changing needs for punishments.

We think that the Executive changes will work, and that they should be given an opportunity to work, at least as an experiment, before a legislative change is enacted.

We also suggest that the approach taken in S. 2521 to punishments disrupts a tradition of very long standing by which the authority to fix maximum punishments is left to the President. The traditional system further contributes flexibility to military justice and avoids the need to so frequently return to the Congress for amendments.

Earlier in this Congress some urgently needed changes were enacted in the Military Justice Act of 1981. We are grateful for those amendments, which have already begun to benefit the orderly administration of military justice and to strengthen command in the Air Force.

In our view, the two bills now before the Subcommittee include important, complex, and major changes to the fundamentals of military justice. We urge careful contemplation and deliberation on the bills now before you.

The UCMJ has been effective legislation. It has worked, and it is working now, and it has required little legislative attention. When you have addressed the UCMJ, you have kept the "military" in military justice, and the "uniform" in the Uniform Code. We need that and appreciate it.

Senator Jepsen. Thank you.

Admiral Jenkins?

STATEMENT OF REAR ADM. JOHN S. JENKINS, USN, JAGC, JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral Jenkins. Thank you, Mr. Chairman.

I also will submit a statement for the record and with your permission just make a few additional comments.

There are in both of these bills in my view many provisions which are important to the continued and efficient operation of the military justice system. I would just like to congratulate you on that portion of your bill which would expand the sentencing power of the special court-martial to 12 months. I think that is vitally important to our system and we support it very strongly.

I also would make a comment or two on that portion of your bill which addresses sentence by the judge alone. It seems to me that such a provision will conform our system in the military with the Federal and most State systems and it is a very logical evolutionary step in the process which was started by the Military Justice Act of 1968 which first authorized the use of military judges.

Our judiciary in the Navy and Marine Corps is now a professional and independent organization. Each military judge must be at least in the pay grade of O-4, and all are carefully selected and screened personally by me, and General Tiernan for the Marine judges, before they are appointed to the judiciary.

Presently, in approximately 87 percent of our trials, sentencing is now done by the military judge, and I believe that sentences by military judges are more consistent and more appropriate than those adjudged by members. This belief has been supported by a recent report of our Naval Audit Service which covered Pacific Fleet activities.

It also seems to me that sentencing by the military judge alone complements the new presentencing procedures which are contained in paragraph 75 of the Manual for Courts-Martial.

As the General Counsel has indicated, this is a matter on which there is no agreement among the Judge Advocates General; and I join with the General Counsel in recommending to the committee that action on this provision be deferred until such time as further study and analysis can be accomplished.

Two more additional brief comments, if I may.

The provision dealing with the Supreme Court review I think is important. I think it is worthy of very serious consideration by the committee. It seems to me as I supervise the workload that is involved in collateral attacks on court-martial actions by the accused, collaterally through the district courts and courts of appeals, that that workload is certainly as heavy as any workload that would be involved in the certiorari provisions, So, personally I don't see workload as a factor.

Lastly, the Department's proposal has amendments to sections 1552 and 1553 of title 10 with respect to the jurisdiction of the boards for the correction of naval and military records and the discharge review boards over final court-martial action. I think it is an important provision, and I urge your very serious consideration of it.

Your comment earlier with respect to whether the Court of Military Appeals would be demeaned by a review by the Supreme Court I think is relevant here because, at least in certain, cases I think our Court of Military Appeals is demeaned by the fact that administrative boards made up, with all due respect, sir, of nonlawyers, are able in certain situations to in effect act as a "special court" over the decisions of the Court of Military Appeals, and I very much would like to see that provision of law changed.

Thank you.

[The prepared statement of Rear Adm. John S. Jenkins follows:]

PREPARED STATEMENT OF REAR ADM. JOHN S. JENKINS, JAGC, USN, JUDGE ADVOCATE GENERAL OF THE NAVY

Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before the subcommittee today to discuss the views of the Department of the Navy concerning the Department of Defense legislative proposal entitled the "Military Justice Amendments of 1982" and S. 2521 entitled the "Military Justice Act of 1982," relating primarily to revisions of the Uniform Code of Military Justice.

I would like to begin my remarks in support of this proposed legislation by placing it in its proper perspective. I believe that the military justice system, as established by the Uniform Code of Military Justice in 1951, is fundamentally sound. There is always, as in any system of justice, room for improvement. It has been suggested that what is needed to improve the military justice system is to dismantle it and start over. I do not agree. I believe that change in this area should be evolutionary, not revolutionary. We should build on our present foundation, rather than construct a wholly new system. To this end, and with the experience of the last 31 years as a guide, these amendments address areas which can be improved to promote fairness and efficiency in accord with evolving criminal law standards.

The Military Justice Amendments of 1982 deal primarily with an effort to simplify the referral and appellate review of court-martial cases, but address other matters as well. I would like to address some of the most significant of these other areas first and then conclude with the major focus of the legislation.

Article 16 will be amended to permit an accused to request trial by military judge alone orally, on the record, as an alternative to doing so in writing, as is now required. This change will conform our practice with the American Bar Association standard relating to trial by jury, which permits an accused to waive his right to trial by jury, "either in writing or in open court for the record."

Articles 25 and 26 will be amended to provide some needed flexibility to excuse court-martial members when that becomes necessary. Presently, only the convening authority can excuse members. Under the proposed change, members could be excused by either the convening authority or the staff judge advocate or equivalent before assembly of the court-martial; and by either the convening authority or the military judge after assembly.

Articles 26 and 27 will be amended to provide a new procedure for detailing counsel and military judges. Presently, when a commander decides to convene a court-martial, he requests that counsel and a military judge be made available for detailing to that court-martial. The commands to which the counsel and military judges are assigned provide the convening authority with the names of those made available and the convening authority then details them to the court-martial by including their names on the convening order that establishes the court-martial. Under the proposed change, detailing of counsel and military judges would be accomplished under regulations of the Secretary concerned, which means that detailing would be handled by the commands to which the counsel and military judges are assigned. This change will eliminate what has become a ministerial function for the convening authority and is consistent with what, in effect, is current practice.

Article 49 will be amended to permit the use of videotape to record depositions and trial proceedings. This is of particular importance for depositions, as it will permit the court to observe the demeanor of those deposed.

Article 62 will be amended to allow for the government to appeal certain legal rulings and orders of a military judge to the Court of Military Review. This proposal parallels Federal practice and fills a void created when the United States Court of Military Appeals determined that the convening authority could no longer overturn the legal rulings and orders of a military judge.

Article 67(g) will be amended to include the Director, Judge Advocate Division, Headquarters, United States Marine Corps, as a member of the Code Committee. He is presently a "de facto" member of that commitee and this proposal merely formalizes his status.

I would next like to address the proposed amendments which deal with the referral and review of courts-martial. These changes are intended to simplify these procedures and reduce workloads, but the changes do not abolish any substantive rights currently enjoyed by an accused.

Article 34 will be amended in two ways. First, the convening authority, a non-lawyer, will no longer be required to make certain legal decisions prior to referral. Second, the individual who will now, in effect, make those legal decisions, the staff judge advocate, must provide the convening authority with his written conclusions as to whether each specification alleges an offense, whether each offense is warranted by the evidence in the report of investigation, and whether there is jurisdiction over both the accused and the offenses. This eliminates the lengthy pretrial advice now required and needed by the convening authority to assist him in making certain legal decisions. As he will no longer have this responsibility, the advice from the staff judge advocate need only provide him with sufficient information to enable him to make the decision as to whether referral to trial is appropriate or not.

The remainder of the changes in this area pertain to the review and appellate process. These proposals are designed to eliminate the present requirement of automatic appellate review of all courts-martial where the sentence includes a discharge, dismissal, or confinement of one year or more and replace it with an appellate system similar to that found in federal appellate courts; and to modify the role of the convening authority in the review process.

Article 60 will be amended so that the convening authority will no longer be required to make legal determinations regarding the case. As a matter of discretion, he may dismiss a charge or specification or reduce it to a lesser included offense, but he is only required to act on the sentence. Prior to taking action on the sentence, the convening authority must consider any matters submitted by the accused within 10 days after the sentence is announced. The convening authority may extend this period by another 30 days on application of the accused. Additionally, in every general court-martial case and those special court-martial cases wherein the sentence includes a bad-conduct discharge, the convening authority must also consider the written recommendation of his staff judge advocate. This recommendation must first be given to the accused who then has 5 days to submit any matters in rebuttal of the recommendation.

Articles 61, 64, 65, 66, and 69 will be amended to eliminate the present requirement of automatic review of all cases within the jurisdiction of the Courts of Military Review (discharge, dismissal, confinement of one year or more). The new system adopts the concept of discretionary appeals by allowing an accused to elect whether or not he wishes to have his conviction reviewed. Mandatory review of cases involving the death sentence would be retained, but all other cases must be appealed in order to be reviewed by a Court of Military Review. While this is a significant departure from the present military appellate system, it will substantially parallel our civilian criminal appellate systems, none of which currently requires automatic review of all cases. Under this proposed new appellate system, an accused will fully understand his options, as he will be advised of his appellate rights by the military judge and defense counsel. In every general court-martial case and those special court-martial cases wherein the sentence includes a bad-conduct discharge, an accused who desires a review of his conviction by a Court of Military Review, must file a notice of appeal within ten days after the convening authority acts on the case, or file an express waiver of the right to appeal. This period may be extended by the officer exercising general court-martial jurisdiction for up to 30 additional days. When an accused elects not to appeal, or his sentence falls outside the review jurisdiction of a Court of Military Review, his conviction will still be reviewed by a judge advocate. If the judge advocate finds that corrective action is required, he recommends such action to the officer exercising general court-martial jurisdiction. If this officer does not take the action recommended by the judge advocate or other action more favorable to the accused, the record of trial and action are sent to the Judge Advocate General of that service for review under Article 69.

These changes are within the spirit of the recommendations of the 1972 Secretary of Defense Task Force on the Administration of Military Justice, and they adopt the premise of discretionary appeals established in the American Bar Association standards relating to criminal appeals. They do not disturb the power of a Court of Military Review to provide appellate review where timely notice of appeal has been filed, nor do they affect the post-trial review by the convening authority to determine if the sentence is appropriate, and whether clemency is warranted. They are designed to eliminate cases from the appellate court docket when the accused believes that review is unnecessary. These proposals should save countless hours and dollars presently devoted to reviews which are automatic, but which do not involve any substantial legal issue, and which were not desired by the accused.

Other changes will also be made to help streamline the appellate process. Articles 19, 54, and 55 will be amended to provide for the nature and disposition of records of trial. Verbatim records would only be provided in cases to be reviewed by a Court of Military Review. In all other cases, a summarized record will be provided, as is current practice. Article 66(a) will be amended to permit a Court of Military Review, sitting as a whole, to reconsider the decision of a panel of that court. Article 69 will be amended to permit the Judge Advocates General to correct general court-martial cases that come before them, without having to refer each case to a Court of Military Review. At present, action by a Court of Military Review is required to correct even insignificant errors.

In addition to these amendments to the Uniform Code of Military Justice, two other important changes are proposed. First, Chapter 81 of title 28, United States Code will be amended by providing for review of decisions of the United States Court of Military Appeals by the Supreme Court by writ of certiorari. This proposal will benefit both the accused and the government and corrects a serious gap in the appellate review process. Finally, sections 1552 and 1553 of title 10, United States Code, will be amended to insure that the review of the legality of courts-martial be accomplished solely in accordance with the provisions of the Uniform Code of Military Justice and not by certain administrative review boards established for other purposes.

Turning now to the Military Justie Act of 1982, S. 2521, I note that its basic focus parallels that of the Military Justice Amendments of 1982. In addition to the comments made by Mr. Taft concerning this proposed legislation, I would like to address two unique and important amendments.

Article 19 will be amended to increase the sentencing power of a special court-martial from six months to one year. This will make the special court-martial a true misdemeanor court and should also reduce the number of cases referred to trial by general court-martial. Our statistics indicate that over 35% of the cases referred to trial by general court-martial actually receive a sentence of confinement of one year or less. Considering the increased sentencing power of a special court-martial, many of these cases should now be tried by special courts-martial. As a further protection for the accused, we propose that all sentences in excess of six months, whether adjudged at a general or a special court-martial, be reviewable under Article 66 of the Code. This will require an additional amendment to Article 66(b) (2) (A) as it is presently set forth in both S. 2521 and the Department of Defense legislative proposal.

Article 26 will be amended to provide that sentencing be done by the military judge, except in capital cases. This will conform our system with the Federal and most State systems and is a logical evolutionary step in the process started by the Military Justice Act of 1968 which first authorized the use of military judges. Our judiciary is now a professional independent organization. Each military judge must be at least in paygrade O–4, and all are carefully screened and then personally selected by me. Presently, in approximately 87 percent of our trials, sentencing is done by the military judge. I believe that sentences adjudged by military judges are more consistent and appropriate than those adjudged by members. This belief was supported by a recent report of the Naval Audit Service which covered Pacific Fleet activities. Sentencing by military judge alone also complements the new presentencing procedures in paragraph 75 of the *Manual for Courts-Martial, 1969 (Rev.)* which were originally drafted with sentencing by military judge alone in mind. As the General Counsel has indicated, this is a matter upon which no agreement has been reached by the Judge Advocates General and the services, and I join with the General Counsel in recommending that action on this provision be deferred until such time as further study and analysis can be accomplished.

The amendments which I have just discussed are necessary to make the military justice system more efficient, yet responsive to the needs of both the accused and the Government. They reflect concepts similar to those now part of the Federal criminal justice system. I believe that the military justice system is the best criminal justice system in our country at this time. Nevertheless, unless it is allowed to evolve, it will not maintain that position. I therefore urge, on behalf of the Department of the Navy, that this legislation to improve the military justice system be enacted.

I appreciate this opportunity to testify on this important legislation, and I will be happy to answer any questions which the Committee may have.

Senator JEPSEN. Thank you.

Mr. PRINCIPI. Admiral Jenkins, will you please submit that report by the Navy Audit Services you alluded to about sentencing by military judges alone.

Admiral JENKINS. We will, sir.

[The information is set forth in Mr. Taft's response to Senator Jepsen's question on page 60.]

Senator JENKINS. Admiral Daniels?

STATEMENT OF REAR ADM. EDWIN DANIELS, USCG, CHIEF COUNSEL OF THE COAST GUARD

Admiral DANIELS. Thank you, Mr. Chairman.

I did not make a formal statement because the Coast Guard has about 1 percent of the cases in the Court of Military Appeals. I thought it would be more appropriate to support the Department of Defense and we do support the Department of Defense in their statement.

There is some emphasis that should be placed on the special court-martial provision in your bill. I think the tendency in the Coast Guard is to appoint the lowest court that will give an appropriate sentence.

Lately we have seen an increase in general courts-martial. Ordinarily we only have had two or three general courts-martial a year in the past several years. This year we have been up to 10. I think the reason is drug offense.

However, eight of those general courts-martial were sentences less than 1 year. So that if we had had the special court-martial power to go to 1 year, I think we would have had more special courts-martial. That would have reduced the burden on the military, the number of members and article 32 and so forth.

The Coast Guard was the first to have video tape. Several years ago we started video tape of the courts which ultimately gave a record that was overruled by the Court of Military Appeals. We did find that video tape was a very valuable tool for depositions. I think it is invaluable.

Thank you.

Senator JEPSEN. Thank you.

General Tiernan?

STATEMENT OF BRIG. GEN. WILLIAM H. J. TIERNAN, USMC, DIRECTOR, JUDGE ADVOCATE DIVISION, HEADQUARTERS, U.S. MARINE CORPS

General TIERNAN. I too appreciate having the opportunity to speak in favor of this legislative proposal. In order to avoid repetition I will simply state the Marine Corps is in full accord with the position expressed by the General Counsel and more specifically, in true keeping with the spirit of the Navy-Marine Corps team, the Marine Corps is in full accord with the position expressed by Admiral Jenkins with respect to judge-alone sentencing.

We fully agree that the military justice system over the years has become overburdened with unnecessary procedures. We are so concerned actually that we have doubts about its efficacy in the next combat environment. Anything that can be done to reduce the cumbersome status of the military justice system would be welcomed by the Marine Corps.

I am convinced that the measures contained in this legislative proposal take a substantial step toward achieving that end. I am very much in favor and I would recommend passage of the legislation for that reason.

That is all I have. Thank you.

[The prepared statement of Brig. Gen. William H. J. Tiernan follows:]

PREPARED STATEMENT OF BRIG. GEN. WILLIAM H. J. TIERNAN, U.S. MARINE CORPS, DIRECTOR, JUDGE ADVOCATE DIVISION, HEADQUARTERS, U.S. MARINE CORPS

Mr. Chairman, Members of the Subcommittee, I greatly appreciate the opportunity to appear before you today and present the Marine Corps position on this important legislation.

The Supreme Court of the United States has said that it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." Echoing that theme our Commandant, General Barrow, noted that "the best kind of war is the one we do not have to fight." The Marine Corps and the Navy deter war "through strength, deter through being available and ready" and by being capable of being put "near the guy who is about to make mischief." The Marine Corps is today deployed around the world near these "mischief makers." Those who are not so deployed are preparing to assume that role. This projection of force in order to maintain peace requires a peacetime Corps on a practically constant wartime footing.

The unique circumstances under which our profession of arms is pursued demand that we have a military justice system which allows the commander to respond swiftly and effectively to incidents of misbehavior, if he is to maintain the high degree of discipline which is the hallmark of an effective fighting force capable of carrying out its mission. It is axioamatic, of course, that the military justice system must also accord to those subject to the time honored, fundamental rights guaranteed by the U.S. Constitution and Anglo-American jurisprudence between these two objectives is, I suggest, the litmus by which to test the practices and procedures of the military justice system. Before we reaffirm an old practice or adopt a new one, we should ask—does it protect fundamental rights and does it contribute to a more effective and efficient judicial system for our unique society? The proposals presented to you by the General Counsel meet this test.

Another matter that should be considered is that many of the practices addressed by this legislation were adopted at a time when lawyers were not required participants in much of the court-martial process. In order to protect the accused from the will-meaning, but sometimes inadequate practice of law by nonlawyers performing in the roles of "counsel," and "judge," elaborate pretrial and posttrial safeguards were adopted. When the code was later modified, requiring lawyer participation at all levels of the court-martial process, these changes were merely grafted onto the old essentially non-lawyer system. We now have a professional trial judiciary and a trial bar that is second to none. There is no longer any need to protect an accused from the inadequacies of those not schooled in the law.

I believe that the proposed legislation will eliminate needless and burdensome procedures without any unfavorable impact on the rights of the accused. The effect of eliminating these unnecessary procedures coupled with the adoption of several new measures—military judge sentencing, and increasing the jurisdiction of special courts, for example—will be a more effective and efficient military justice system. Passage of this legislation will be a major step toward adapting the Uniform Code of Military Justice to war-time requirements without sacrificing any cherished principles of due process.

I recommend passage of the legislation as presented to you by the General Counsel.

Senator JEPSEN. You express in your statement that there is no longer any need to protect the accused from the inadequacies of those not schooled in the law, professionally and so on, you have people in your own service that essentially provide the lawyers and judges. I appreciate that.

General TIERNAN. In that regard I would like to add one further footnote. That is the fact that the Marine Corps has complete confidence and I am speaking for the Marine Corps commanders now, in the quality and depth and expertise which our judiciary now has, which has been a change as compared to several years past.

I don't think it is a question really of the loss of commanders' prerogatives as much as it is the question of increasing the efficiency of the system.

SENTENCING BY THE MILITARY JUDGE

Senator JEPSEN. Along those lines, Mr. Taft, what is so unique about the military that dictates sentencing by a jury?

Mr. TAFT. There are many aspects of the military justice system that are unique. General Bruton referred to the one that has most to do with the point you raised about sentencing by the members and that is the role of the commander and other officers in the system.

The system is for them. The nature of their role is what we have been concerned about with this proposal, and we have essentially not resolved those concerns. It should be borne in mind that the member sentencing is only done where the accused does not request judge-alone sentencing. What he now has is the option to get member sentencing when he does not request trial by the judge.

Our feeling is that where the accused wants to have member sentencing it involves the officers of his command in decision of the court-martial. In such cases, the extent of the sentence is a matter in which the command has a role.

Because we have not been able to resolve our doubts about these issues in the time that we have had to consider this, we are reluctant to adopt this provision at this time. We would like to study it further.

Maybe General Bruton would like to elaborate further.

Mr. PRINCIPI. I think you raise an important point. If the accused wishes to be sentenced by the judge alone, the accused must also consent to be tried by the judge alone. This is no option. Is that correct?

In other words, with this option of being sentenced by the judge alone the accused can still request and receive a trial by his or her piers?

Mr. TAFT. That is the way your proposal is, that the accused would retain the option of having members determine guilt or innocence, but he would not have the option of selecting them for sentence.

Senator JEPSEN. General Bruton?

General BRUTON. I agree with the statement Mr. Taft has made. I consider an important part of the problem to be what is an appropriate sentence and who is making the judgment. It might be said that judges, professional judges, can better make appropriate sentences.

However, I believe a blue ribbon panel of officers and enlisted men could perhaps be the people who give the appropriate sentence. As a matter of fact, I believe in the Air Force that the judges often gauge their sentences, appropriate as they may be, by what the court members in similar cases are sentencing.

It is very difficult to say that judges give consistent sentences and court members do not. I think statistics do not show one is more consistent than the other.

Finally, I think that the uniformed members have a duty to sit on courts not only to find the facts, but I think it is an appropriate part of their training to be commanders and to judge what the needs of their community are and what an appropriate sentence should be. It is part of their training and part of their duties. I do not think that should be divorced from them.

Senator JEPSEN. Does anyone want to comment on the fact that Federal courts and a vast majority of the State courts do in fact have judges determine sentences?

General CLAUSEN. If I may, I would like to add a footnote to the comments of General Bruton.

I don't think it is a question of confidence in the judiciary. We have had an independent judiciary in the Army since 1958. I am confident that they are able to both make findings and also adjudge sentences that are appropriate.

The question I believe is whether it is appropriate at this time to take something away from the soldier, the right to not only be judged by his peers, but also to be sentenced by his peers which the soldiers have had since the Revolutionary days when we basically adopted the British Articles of War.

Moreover, I think under the Elston Act in 1948 the Congress saw fit to allow the accused to choose to not only be judged, but to be sentenced, as well, by a court consisting of one-third enlisted soldiers. That is a right which I think we should be reluctant to take away from the soldier in the name of efficiency.

Mr. PRINCIPI. If I could comment, juries certainly are capable, whether they are blue ribbon panels or otherwise, of discharging their responsibilities on the merits as triers of fact because the facts are based on a standard, either they exist or they do not exist.

It would seem to me that sentencing requires some expertise or knowledge of the reasons for punishment, the nature of the punishment, retribution, rehabilitation, defense.

Isn't a judge who is certified and has been sitting on a bench for a period of time better able to weigh those factors and impose an appropriate punishment than a blue ribbon panel or another group who never sat on a jury before or maybe just once or twice and are more likely to be swayed by the defense counsel?

General BRUTON. No.

General TIERNAN. Yes.

Admiral JENKINS. Absolutely.

Mr. TAFT. I think, as you can see, there are varying views here. The point that has struck me is that in the present situation I have tried to introduce these gentlemen's views to each other, tried to ask them to persuade each other that they should have a different view. There is uncertainty as to the impact of this. There is not a consensus as to the desirability of it.

I think that the comparisons between the civilian system and the military system are good up to a point, but in the end, as the chairman said in his opening statement, the systems are not identical and we should not force an identity of the two systems where it would disrupt or disturb the special character of the military.

When you get to the jury there is a very distinct difference between the jury that you have in a civilian trial, which is drawn from the community at large, and the panel of members selected by the convening authority to perform this duty and to carry out the responsibility that they have on a court-martial.

They can be ordered, if that is necessary, to attend and to study all of the things that they should know and that they should study to be good sentencers. They can be selected because they are skilled and knowledgeable on these points and they cannot be selected if they are not wise and good at that kind of thing. It is up to the convening authority. He would select, I am sure has selected, good panels, good people to serve on these panels, people in whom he has confidence.

This is not at all to say that what has been said about the judges and their abilities is not correct. Admiral Jenkins points out 87 percent of the Navy's sentences are done by judge-alone anyway. I am sure those judges are judging splendid sentences and we have the utmost confidence in them.

You can go either way. The question is whether you take the right away from the service member that he has now. Before we do that, we ought to have a little more agreement and little more confidence than I have been able to sense in the experts with whom I have been talking.

Senator JEPSEN. Before we move on to another subject here, in view of the divergence of views on this issue, would everyone here prefer to have a service option? I would like to take an inventory. Is there anyone here that would prefer to have a service option on this issue?

Admiral JENKINS. Mr. Chairman, the Navy position, which of course is subject to the discussion that the General Counsel has told you about, was developed with significant input from our line commanders. I want to make it clear this is not a lawyer's position on this issue.

The line commanders made their recommendations, and their recommendations were for sentencing by judge alone. So, I would have to answer your question by saying that, if there be no consensus on the subject and if in the wisdom of the Congress service option were provided in this area, the Navy would clearly opt for sentencing by judge alone.

Senator JEPSEN. Marines?

General TIERNAN. Exactly the same position.

Senator JEPSEN. Army?

General CLAUSEN. I can only give you my personal view, Mr. Chairman. We have not made a survey of all our commanders to the extent that the Navy has done by going out with a letter.

I believe, based on my discussions with commanders as I have traveled about, that the consensus would be to retain the present system.

Senator JEPSEN. Air Force?

General BRUTON. The Air Force would have the same view as the Army.

Admiral DANIELS. We would probably go with the prior comments.

Senator JEPSEN. Can you provide any data that each service might have on the nature of punishment imposed by judges and juries as well as views of naval commanders so that we can assess it?

Mr. TAFT. We will be delighted to do that.

[The information follows:]

Analysis of Military Judges Versus Court Members Sentencing, Army Courts-Martial Jan-Jun 82

1. Average Days of Confinement Adjudged When the Sentence Included Dishonorable Discharge

	JUDGE ALONE	COURT-MEMBERS
Sale and possession of controlled substance	1,161	1,598
Larceny of $100 or more	1,326	2,108
AWOL/Desertion	1,787	2,281
Rape	5,025	4,843

2. Average Days of Confinement Adjudged When the Sentence Included a Bad-Conduct Discharge

	JUDGE ALONE	COURT-MEMBERS
Sale and possession of controlled substance	181	294
Larceny of $100 or more	254	304
AWOL/Desertion	171	317
Rape	261	1,286

Navy. The following data compares the relative sentences of courts composed of members and of military judges, based on analysis of 179 Courts-Martial tried between 1 October 1981 and 31 March 1982:

TYPE OF OFFENSE	COMPOSITION OF COURT AND SENTENCING IMPOSED	
	Members	Military Judge
a. Absences	None to 12 mos.	2 mos. to 18 mos.
b. Assaults	2 mos. to 3 yrs.	5 mos. to 10 yrs.
c. Drug Offenses (possession, sale, transfer, conspiracy)	None to 4 yrs.	None to 10 yrs.

d.	Forgery, Fraud, Bad Checks	3 yrs to 5 yrs.	10 mos. to 2½ yrs.
e.	Housebreaking	8 mos. to 5 yrs.	8 mos. to 2 yrs.
f.	Murder	Life (1 case)	40 yrs. to Life (2 cases)
g.	Orders Violations	12 mos. to 18 mos.	4 mos. to 12 mos.
h.	Rape, Child Molestation	12 mos. to 20 yrs.	8 mos. to 8 yrs.
i.	Other Sex Offenses	None to 6 mos.	8 mos. to 6 yrs.
j.	Robbery	3 yrs. to 5 yrs.	7 mos. to 10 yrs.
k.	Selling/Damage to Gov't Prop.	6 mos. to 5 yrs.	9 mos. to 2 yrs.
l.	Thefts/Larceny	None to 5 yrs.	5 mos. to 4 yrs.

Air Force

The following material summarizes the results of an analysis in January 1982 of information in the Air Force Automated Military Justice Analysis and Management System. The data base searched included 6,634 cases in calendar years 1977 through 1981, inclusive. As a result of technical difficulties, about 300 other cases in that period were not considered.

Some cautions are necessary when interpreting this information. First, 60 percent of the guilty plea cases were tried by military judges sitting alone. This imbalance would affect interpretation because pleas of guilty are significant factors in mitigation. The method of the study also requires comment. This study did not control such variables as the nature of the offense or the infinitely variable characteristics of the offender and the circumstances of the offense. Of course, any study that comprehensively controlled those variables would, as a necessary result, reduce its data base substantially, perhaps to the extent that the resulting comparison would be statistically insignificant. The following information is expressed in raw counts, averages, and percentages, not in standard deviations or other sophisticated statistical formats. As a result of these two qualifications, reliable conclusions drawn from this data must be limited to general trends.

AIR FORCE

Sentence Comparison

Military Judge Alone - Court Members

6,634 General and Special Courts-Martial 1977 to 1981

CATEGORY	GENERAL COURTS		SPECIAL COURTS	
	JUDGE	MEMBERS	JUDGE	MEMBERS
Number of Cases/ % of Total				
1977	72/46%	86/54%	355/42%	487/58%
1978	47/33%	95/67%	367/41%	533/59%
1979	103/46%	119/54%	537/49%	564/51%
1980	198/54%	169/46%	784/56%	619/44%
1981	161/61%	102/39%	725/59%	511/41%
Sub Totals	581	571	2,768	2,714
Total	1,152		5,482	
% of Total	50%	50%	50%	50%
No. of Acquittals				
1977	3	17	23	79
1978	1	11	18	79
1979	2	15	21	80
1980	7	32	17	75
1981	0	13	19	65
Total	13	88	98	378
% of Total tried by	2.2%	15.4%	3.5%	13.9%
No. of Discharges:	BCD, DD, Dismissal			
1977	60	43	36	82
1978	33	47	44	106
1979	86	77	94	139
1980	157	101	158	150
1981	133	64	170	133
Total	469	332	502	610
% of total cases where a sentence was imposed, i.e. total cases tried by each minus their acquittals	82.5%	68.7%	18.8%	26.1%

(Air Force Sentence Comparison Continued)

CATEGORY	GENERAL COURTS		SPECIAL COURTS	
	JUDGE -	MEMBERS	JUDGE -	MEMBERS
Months Confinement at Hard Labor				
1977	1,312	954	795	490
1978	478	1,189	810	605
1979	1,996	2,503	1,364	777
1980	4,021	3,529	2,177	1,020
1981	3,658	1,888	2,115	1,029
Total	10,745	9,703	7,261	3,921
Ave Confinement per case in Months				
1977	19.0	13.8	2.4	1.2
1978	10.4	14.1	2.3	1.3
1979	19.8	24.1	2.6	1.6
1980	21.1	25.8	2.8	1.9
1981	22.7	21.2	3.0	1.7
Five Year Average per case	20.2	20.8	2.7	1.7
Reductions in Grade Total Stripes Reduced				
1977	123	146	347	531
1978	81	174	379	585
1979	181	207	531	591
1980	343	263	932	677
1981	330	179	940	653
Totals - Five year	1,058	969	3,129	3,037
Average Reduction Per Case				
1977	1.8	2.1	1.0	1.3
1978	1.8	2.1	1.1	1.3
1979	1.8	2.0	1.0	1.2
1980	1.8	1.9	1.2	1.2
1981	2.0	2.0	1.3	1.5
Five-Year Average Per Case	1.9	2.0	1.2	1.3

(Air Force Sentence Comparison Continued)

CATEGORY	GENERAL COURTS		SPECIAL COURTS	
	JUDGE -	MEMBERS	JUDGE -	MEMBERS
No. of Cases in which Total Forfeitures were adjudged				
1977	24	21		
1978	9	21		
1979	32	40		
1980	57	43		
1981	56	31		
Total	178	156		
% of All Cases Tried By: (minus acquittals)	31%	32%		
Avg. Partial Forfeitures				
1977	$1,920	$1,021	$365	$491
1978	$1,544	$1,493	$376	$542
1979	$3,690	$3,077	$538	$574
1980	$2,100	$4,166	$602	$627
1981	$4,883	$3,640	$808	$807
Five Year Avg.: (Acquittals & TF Cases Deducted)	$2,845	$2,892	$586	$610

Guilty Plea Cases	General & Special Courts Combined	
1977	229	206
1978	250	246
1979	365	263
1980	608	323
1981	561	251
Total No. of Guilty Pleas	2,013	1,289
% of all cases tried:	50%	
% of all cases tried by:	60%	39%
Five year total life sentences imposed by:	2	1

EXTRACT FROM NAVAL AUDIT REPORT T10180, ADEQUACY OF LEGAL SERVICES PROVIDED TO PACIFIC FLEET UNITS

10. Sentencing by military judge alone

a. Sentencing by members (i.e., jury) rather than military judge alone causes inconsistencies and disparities in punishment, somewhat delays processing of trials, can result in misinterpretation and possible dismissal of the case, and is inconsistent with procedures in other Federal courts.

b. Article 16 of the UCMJ provides for the right of the accused to be tried by a court consisting of members or by military judge alone. This right reflects the mandate of the 6th Amendment to the Constitution (i.e., right to trial by peers), and has been interpreted to cover separately or together the trial on its merits and the sentencing (MCM, pars. 4, 14, 15, 75 and 76). This interpretation permits the accused to elect trial and sentencing by members, contrary to other Federal courts where sentencing by members is not allowed.

c. Sentencing problem would be alleviated if all CM sentencing were provided by military judge alone.

(1) Inconsistent and inappropriate sentence

(a) COs perceive that one of the major problems of military justice is inconsistent and inappropriate (i.e., less than adequate) sentences. While personnel stated that both judges and members were at fault, further questioning indicated that their comments were often general and based on hearsay rather than direct knowledge as to who was responsible for the "inappropriate" sentences. Additional review indicated that members were generally the cause of less severe inconsistent sentencing. For example, the NLSO Subic Bay received complaints about the adequacy of sentences; consequently, the NLSO initiated a biweekly analysis for CAs showing the offense, sentence, and who (i.e., member or judge) awarded the sentence. This analysis showed that the judge provided more appropriate and consistent sentencing.

(b) Inconsistent and inappropriate sentences result from members because they often have not been court members previously. Consequently, they are much more susceptible to the "stories" and other reasons cited by the accused to mitigate his sentence. On the other hand, judges usually have heard these excuses many times and can determine what is meaningful and what is not.

(c) Another reason for problems with sentencing by members is that the best personnel often are not assigned to CMs. Commands prefer to retain their key personnel for command operations and day-to-day business. Further, senior officers are often challenged off the court. Consequently, the court may be composed of junior officers and other personnel who are available or are not considered essential to the command. Although commands are reluctant to assign their key personnel to CMs, they complain when the results of the trial or the sentence are not to their liking.

(d) Perhaps a key factor in this problem is that sentencing by members pressures the judge to keep his sentence lighter than he might otherwise. If his sentences continually are perceived as too harsh, defendants would never elect sentencing by military judge alone, thus causing further delays in processing CMs, exacerbating military justice problems, and adversely affecting CO perceptions regarding military justice. In summary, judges' sentencing is tempered by the possible increase or exclusive election of sentencing by members.

(2) Delays in processing CMs and possible misinterpretation. Jury sentencing may cause minor delays in processing CMs, due to the instruction and deliberation process. With members, the judge must instruct the jury on all aspects of sentencing, punishment, etc., which would not be required if he alone were sentencing the accused. Further, the process of instruction by judge is subject to misinterpretation (i.e., which would not be required if he alone were sentencing the accused. Further, the process of instruction by judge is subject to misinterpretation (i.e., members do not correctly understand the judges' instruction) resulting in errors which can lead to dismissal or overturning of the case. In addition, the deliberation process of a group of people is often more time-consuming than the judge alone.

d. Sentencing by judge alone previously has been proposed to and rejected by the line community because of perceived inadequacies and inappropriateness of sentences. Some personnel believe that the checks and balances on judges provided by the member option is necessary to protect the accused. However, for the reasons discussed in paragraph c., we believe that the line community's fears are not warranted and that, in fact, punishment would be more consistent and appropriate when awarded by judge alone. That is not to say that inconsistencies between judges in different areas will be eliminated; rather, sentencing in one location would be relatively consistent and known by concerned personnel.

Recommendation 19. OJAG take action to require that all CM sentencing be awarded by military judge alone.

CINCPACFLT Comment. CINCPACFLT agrees that the military judge should determine the sentence for all CMs. The conclusion that military judges impose more significant and consistent sentences is further supported by the results of a recent sentencing seminar conducted by the Circuit Military Judge, Island Judicial Circuit:

Comparison of sentences

	Non-JAGC officers*					
Sentence	Rhode Island		Hawaii		Judges**	
	No.	Percent	No.	Percent	No.	Percent
BCD (no CHL)	2	6.6%	0	0.0%	0	0.0%
BCD (some CHL)	2	6.6	4	7.1	2	14.3
CHL (no BCD)	8	26.6	34	59.6	12	85.7
No BCD or CHL	18	60.0	19	33.3	0	0.0
Total	30	100.0%	57	100.0%	14	100.0%

* Includes Navy, Marine Corps and Coast Guard officers of various ranks attending Naval Justice School Senior Officer Course.

** Includes Navy and Marine Corps JAGC officers of 0-4 to 0-6 rank.

Mr. **Taft**. Let me make one comment on the problem of the service option. I see a difficulty not only in one service opting to do something different from another service.

If you give the service an option, you give it an option not only to do it, but you give an option to change it back if they are dissatisfied with the system. I would not think it would be desirable for the Congress to authorize the service secretary to go to judge-alone when he feels like it, and to go back to members the next year if he does not think it is working.

It is not the type of subject where he ought to have that type of discretion to reverse, not only to vary from the Secretary of another service, but to vary from his own predecessors and change his mind. I think that the serviceman's system demands more consistency than that.

A PUNITIVE ARTICLE CONCERNING DRUGS

Senator **Jepsen**. Mr. Taft, do you believe that it is the Congress responsibility to be directly involved in the control of the drug problem in the Armed Forces?

Mr. **Taft**. Indeed I think it would desire to do so.

Senator **Jepsen**. The punitive articles of the Uniform Code of Military Justice would proscribe certain activities from simple unauthorized absence all the way to murder. If drugs are a serious threat and impediment to military readiness and constitute a substantial percentage of all prosecutions, why do you oppose a specific statutory provision pertaining to that activity?

Mr. **Taft**. Mr. Chairman, we are in the process of specifying through Executive order the sort of precise penalties addressing drug offenses that you have discussed. The traditional way of dealing with penalties and punishments has been for the President to establish them under article 56 of the UCMJ.

My belief is that this has worked well. It preserves the flexibility. I am not at all persuaded that the President has not adopted the correct sentences nor do I believe that the Congress has that view.

I think if the Congress felt that the President were not establishing the correct sentence levels, then it would have the authority to establish minimum or maximum punishments.

I don't think that is the case here. In the circumstances where we can establish appropriate punishments through Executive order, that is the route that we have traditionally honored and that I would favor.

Senator **Jepsen**. When was the last time a manual change was made to deal more forcefully and directly with the tremendous drug problem that we have been experiencing in the past years?

Mr. **Taft**. I am not sure when the last one was. We have one in the works right now if I am not mistaken.

Senator **Jepsen**. That was 30 years ago.

Mr. **Taft**. It is about time we change that and that is what we are doing.

Senator **Jepsen**. Isn't it true that your proposed manual changes were expedited after learning that a provision in S. 2521 contained a specific drug offense article?

Mr. **Taft**. I am not sure that is the case. If it was the case, I think that is a good thing, they should have been expedited.

[Additional information follows:]

On April 13, 1982, the Department of Defense published notice of a public comment opportunity with respect to the proposed amendments. 47 Fed. Reg. 15823. The amendments contained a proposed effective date of October 1, 1982. The comment period, which closed on June 28, 1982, was followed by routine coordination within the executive branch. The President signed the amendments on September 27, 1982. Exec. Order No. 12383, 47 Fed. Reg. 42317, with an effective date of October 1, 1982.

Senator **Jepsen**. If more flexibility is what you need, do you have any suggestion to the drug article provision in S. 2521 other than deleting it?

Mr. **Taft**. We have no further suggestion. I leave it up to the others here.

Senator **Jepsen**. Any suggestion?

General **Clausen**. My own view, sir, at least my own personal view, is that I don't know that there is any objection to having a provision specifically in the code to deal with the drug problem.

As you mentioned, there are, of course, specific articles dealing with AWOL and a number of other offenses.

Senator **Jepsen**. So that we are starting from the same base, the recommendation was that you keep the provisions regarding the drug problems in the manual, not by statute. I guess we are just exploring why.

General **Clausen**. My thought, sir, is that we ought to retain the traditional way of dealing with punishment in the manual. I see no reason why there should not be a specific article that outlaws the use of drugs.

We have articles that outlaw AWOL, rape, murder, robbery, all of those things. However, the Congress, in its wisdom, over the years has elected, with only a very few exceptions, to allow the President to establish the punishment for those offenses. There are very few exceptions to that in the manual.

I think it is wise, personally, for that to be vested in the Executive. It is so easy to adjust those over the years as times change and different needs arise and of course that has been done over the years in a number of instances.

Senator **Jepsen**. So we define it in the article and let the punishment be decided by the President? Is that satisfactory?

General **Clausen**. My personal view is that that would be just fine, sir. We have done that with every other offense.

Senator **Jepsen**. Any comments?

We have some additional questions for the record.

Thank you very much. This has been very interesting. I look forward to moving along and working on this.

The disciplines that we have talked about are in my opinion the same disciplines we need not only in the military, but also in all other areas including the minor ones, the pebbles in the basic school system, family unit, on up to the big shoulders of the Supreme Court legal area.

In the absence of what some people think, that there are no absolutes, which I think is totally erroneous, there are few things that prevail today to sharpen and strengthen both justice and at the same time discipline, which is something that is very much needed and in my opinion shared by many others, very much wanted, by the young, and when I say young I mean very young.

There are also some questions about which I would like to have Mr. Principi have an exchange of ideas with you. If you could, I would ask you to remain and I will excuse myself. I have to go to discuss a noncontroversial item called Radio Marti with the Foreign Relations Committee. Thank you.

Mr. Taft. Mr. Chairman, thank you very much for the opportunity to appear and for your consideration of this important legislation.

COURT OF MILITARY APPEALS RETIREMENT

Mr. Principi. Mr. Taft, the Court of Military Appeals has a retirement program which is much less attractive than for any other judges in the Federal system, including Tax and Bankruptcy Court judges.

In your opinion should this inequity be corrected?

Mr. Taft. Yes, we believe that the present retirement system is inequitable and that it should be remedied. We do not want to get specifically into the proposing of a retirement system.

We do not oppose any solution to this problem that is agreeable and supported by the court itself. We think that it is something that they should be the prime movers on.

We specifically do not oppose and could happily support the provision in S. 2521 or any other resolution. This inequity should not be allowed to exist.

RECRUITMENT OF JUDGE ADVOCATES

Mr. Principi. I have another personnel-related question and it is for the Judge Advocate General.

I know the chairman believes it is important for the military services to be represented by highly qualified attorneys to discharge the myriad of responsibilities of the uniformed services. For attorneys under the current compensation system, are the services capable of meeting their recruiting and retention goals for these highly qualified counsel?

General Clausen. I can only say that at the present time we are doing very well which I believe is a combination of enlarged output of law students throughout the United States and also economic conditions.

I would point out that under the recently enacted legislation, the Defense Officer Personnel Management Act, we no longer will be able to bring lawyers into the Army as captains. Rather they will be brought in as first lieutenants. We will have our first class of those in October.

The first lieutenant makes about 15 percent less than a captain. Exactly how that is going to affect our recruiting efforts I am not able to say at this time. It will probably have some effect.

Mr. Principi. Any other comments?

MILITARY LEGAL ASSISTANCE

Mr. Taft, a number of bills have been introduced to provide legal assistance to members of the Armed Forces and their dependents.

I believe the bill provides a statutory basis for military legal assistance.

Does the Department support that proposal?

Mr. TAFT. We support the idea of providing a statutory basis for legal assistance. We do a fair amount of legal assistance at the moment. We would like to do more. We are proud of what we do now.

At the moment we don't require a statutory basis to do it, but we support a statutory basis as long as it did not turn it into some sort of a requirement for an entitlement-type situation. We have limitations on the legal services we can provide to meet the desires of two million people in uniform.

If we were to have the statutory basis it would be helpful. We would support it as long as we had the caution I mentioned.

Mr. PRINCIPI. Would it be helpful in getting dollars for the legal assistance program? Is that the primary purpose for budgeting?

Mr. TAFT. I have heard that the point has been raised that the statutory responsibilities of the Department should have first claim on scarce dollars. I don't believe that this led us to neglect the provision of legal assistance substantially, but if anybody thought that it would be helpful to have it statutorily established, it might have an impact.

It would not have an impact on me as to the amount of dollars that should be allocated to it, or on many people. If there are some people out there who think a statutory basis is necessary, we can solve that little problem for them if we have to.

WAIVER OF APPEAL

Mr. PRINCIPI. I have just one further question.

We both agree that there is no necessity for automatic appeal in all cases. The chairman agreed with your statement it represents an inefficient use of judge advocate resources and unnecessarily delays consideration of cases in which the appeal is important to the accused or to the system in general.

We disagree, however, on the necessity for a signed, written waiver of appeal. I don't believe there is such a requirement in our Federal or State courts. It would seem to me that a recommendation for a signed, written waiver evidences a lack of confidence in military judges and counsel to adequately advise, counsel and represent the accused.

It would also seem to me it would again lead to frivolous appeals and in no way would stop the accused from alleging that counsel was incompetent or incorrectly advising him by telling him to sign that written waiver of appeal.

Could you comment on this or perhaps the Judge Advocate General could comment on this necessity for this signed, written waiver.

Mr. TAFT. There are two points I wish to make and others may wish to add comments.

One is that what you say about the civilian system is, of course, true. We are moving from a system where we have automatic reviews in that direction. Whether we should go the whole way, go just part of the way, or not permit the waiver at all, is a question we have resolved by taking a step in that direction.

I think it might be wise to still require that the signature be there, in which case we will go only halfway to the civilian system. We are headed in that direction. Whether we need to go the whole way at this time is not so clear.

The second point that I would make is that the military appeal, the appeal that is available in a court of military review, is of a different character from what is available on the civilian side. The person who does not appeal in the civilian courts basically loses his opportunity to challenge errors of law in the proceeding below.

On the military side there is much more available at the appellate level. Consideration of the appropriateness of the sentence is of particular importance. Because there is more at stake in an appeal and you can win more and get consideration of more issues in an appeal in the military system than you can on the civilian side. We perhaps have included this caution before the waiver is effective.

Mr. PRINCIPI. Thank you, sir.

Minority counsel has a few questions.

Mr. BESOZZI. Isn't another difference, Mr. Taft, that generally in the civilian system you may have the same counsel that is following the case through whereas in the military system you have a separate appellate counsel?

Mr. TAFT. Yes. As I understand it, the waiver would be done by the trial counsel and you would only subsequently get to see your appellate counsel. You might think that he had made a mistake.

ROLE OF THE CONVENING AUTHORITY

Mr. BESOZZI. I have just a couple of questions relating to the revisions to the pretrial and posttrial role of the convening authority.

There has been some comment here about the reaction of military commanders to some of these proposals. I wonder if the judge advocates have gotten any reaction to the proposals that would modify somewhat the role of the convening authority as a reviewer and the pretrial process in general of the court-martial, whether reactions are favorable, negative or what?

Mr. TAFT. I believe it has been favorable from the reports I have been given. Perhaps some of the judge advocates general would like to tell us about the specific accolades they have received.

General CLAUSEN. I certainly agree with Mr. Taft. My conversations with Army commanders over a number of years leads me to say that they would welcome an opportunity not to be burdened with some of the things with which they are now charged.

The main truth of the matter is that both the pretrial advice and posttrial reviews today are written not primarily for the commander at all, but for lawyers and military judges here in Washington.

Admiral JENKINS. That certainly is supported in the Navy.

General BRUTON. Air Force commanders appreciate being included in the process. However, the proposal limits, not necessarily excludes.

PRETRIAL ADVICE

Mr. BESOZZI. Let me ask a specific question about the pretrial advice in the way both proposals would be changed.

The staff judge advocate would have responsibility for rendering legal opinion or legal advice before the convening authority to refer the case to a general court-martial.

Is there any concern on your part that this could lead to a situation where a convening authority really wants to send the case to trial, that he would pressure or try to influence the staff judge advocate to provide him with the necessary finding to do so?

Mr. TAFT. I think that in such a situation where the convening authority wants to send the case to trial this is unquestionably communicated to the staff judge advocate, but in no way that I am aware of, should this result in the staff judge advocate shaping the legal advice that they give in responses.

The staff judge advocate may be aware of the convening authority's interest, but his professional obligation is to provide the convening authority with straight legal advice. If the evidence, in their judgment, is not sufficient or if an offense is simply not stated, I have no doubt but that they will tell him so. I think the convening authority would like to know it because it is not going to do him any good, even if he wants to send this case ahead, if it has the type of legal defect that the staff judge advocate should be pointing out to him; it is not going to do the staff judge advocate any good if he does not point it out and the convening authority sends it on and ultimately it gets thrown out for just precisely that reason.

General CLAUSEN. I agree with Mr. Taft as a point of emphasis.

RECORD OF TRIAL

Mr. BESOZZI. We have also made or there are some revisions made in these proposals concerning access to the record of trial and notice of appeal would have to be filed in the certain cases before a complete record would be prepared.

In a situation where the defense counsel would need access to that record of trial in order to prepare his posttrial brief or posttrial rebuttal, would these proposals in your view permit him to get access to the record of trial?

Mr. TAFT. I believe that they would where he showed that that was something that he needed. In our bill there are up to 40 days after the case is over before the convening authority is out of his ability to issue extensions for filing a clemency petition.

I would think within that period of time if the defense counsel made a request for the record to be prepared, there is no question that it could be prepared and made available to him and I would expect that to be the practice.

Mr. BESOZZI. I have two more questions. One relates to the extension of the jurisdiction of the special court-martial.

I wonder if you could elaborate somewhat, one, on your understanding of why the jurisdiction of the special court martial is set at 6 months' confinement initially and why you think that rationale has now gone by the wayside and you need to extend jurisdiction?

Mr. TAFT. I would defer to people with more experience, but my impression is special courts-martial empowered to adjudge 6 months' confinement were created almost 70 years ago. At that time, there was no military judiciary to preside over special courts-martial. Lawyers were not involved in courts-martial to protect the rights of the accused at that time. Now we have judges, lawyers, and appellate tribunals. Perhaps and at that time it seemed to the Congress that 6 months should be the maximum that should be allowed without the protection which today is routinely available in that forum as well as in the others.

SENTENCES BY SPECIAL COURTS-MARTIAL

Mr. **Besozzi.** Would you provide for the record any estimates that you may have about how many cases are currently going to general courts-martial that you expect will wind up in special courts-martial.

Mr. **Taft.** We could provide data on what cases in general courts-martial have resulted perhaps in sentences of less than a year. I don't know that our expectation would necessarily be borne out. I think maybe the historical data would be better. You could look at it and reach your conclusions.

Admiral **Daniels.** We have 80 percent at this point.

BOARDS FOR CORRECTION OF MILITARY RECORDS

Mr. **Besozzi.** One last question relating to the provisions of the jurisdiction of the boards for correction of military records.

Is this basically an outflow of the decision here in the court of appeals in *Baxter* v. *Claytor* where the court of appeals here in the District indicated that the boards for correction of military records do have the power under current law to correct a discharge or to remove a discharge that is part of and parcel of a court-martial conviction?

Mr. **Taft.** Yes, we are very concerned about that and I think particularly about some of the dicta in that case, about how even the DRB's might have this authority. We think that this glimmer ought to be snuffed out.

The way to do that is to make it very clear in the statute that they do not.

Mr. **Besozzi.** Is the proposed change to the discharge review board jurisdiction also an outflow of that?

Mr. **Taft.** Yes, insofar as that was suggested as a possibility in that case. I don't want to limit our support for these provisions to simply describing it as a reaction to a court decision. We affirmatively support the idea that these boards should not have that authority. We don't want them to have it. We don't want them to have it now and we don't want them to have it in the future.

Mr. **Besozzi.** Do you happen to know if there was ever any consideration given to appealing that case or taking that case to the Supreme Court?

Mr. **Taft.** I am not familiar with that.

Admiral **Jenkins.** Yes, the services strongly supported such appeal. The Solicitor General, for all of those good reasons that Solicitor Generals have when they don't take it forward, decided not to go forward.

Mr. **Taft.** Did he suggest perhaps we could get a legislative remedy?

Admiral **Jenkins.** As a matter of fact that was one of his suggestions.

Mr. **Besozzi.** I have additional questions for the hearing record.

Mr. **Principi.** We will submit additional questions for the record. Thank you very much.

Mr. **Taft.** Thank you. We will be glad to respond.

[Questions with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR ROGER W. JEPSEN

AUTHORITY OF JUDGES TO SUSPEND SENTENCES

Senator **Jepsen.** All are opposed to the Military Judge having suspension authority. What is your opinion on juries having this authority? Do Federal and State court judges have this authority?

Mr. **Taft.** We would oppose authorizing the court members to suspend sentences for the same reasons that we oppose granting such power to the military judge. Federal civilian judges have the authority to suspend sentences. 18 U.S.C. § 3651. In the civilian system, unlike the military justice system, the judges also have the power to appoint probation officers, direct their activities, monitor the probationer, and revoke suspension. 18 U.S.C. §§ 3654–55. The military judiciary is not situated or staffed in a manner that permits such administrative responsibilities, and these duties would be particularly difficult in time of armed conflict. Every state jurisdiction currently authorizes its courts to impose some form of probation, although the form and terminology of the action varies from State to State. *See* Standards for Criminal Justice § 18–2.3 (American Bar Ass'n 1980).

CONFINEMENT AT HARD LABOR FOR ONE YEAR

Senator **Jepsen.** Mr. Taft, what is the basis for your recommendation that the protections afforded an accused when a bad-conduct discharge is adjudged by a special court-martial apply when confinement is for more than six months? Currently, there is no such right unless the accused received confinement at hard labor for one year.

Mr. **Taft.** The proposal for extending the jurisdiction of special courts-martial to include 1-year's confinement is based, in part, on the analogy to the civilian sector, in which the dividing line between a misdemeanor and a felony is 1-year's confinement. 18 U.S.C. § 1(1). In the civilian sector, 6-months' confinement is the dividing line between petty offenses and other misdemeanors. If we are to expand the jurisdiction of special courts-martial, this is an appropriate dividing line between those cases in which there is review in the field and those cases in which there is full appellate review by a Court of Military Review.

NON-JUDICIAL PUNISHMENT

Senator **Jepsen.** As long as the committee is considering various changes to the Code can you advise us whether the current structure of Article 15, Non-Judicial Punishment, meets the needs of the operational commander?

Mr. **Taft.** The Code Committee has not brought to my attention any official information which indicates the services are experiencing any difficulties with current Article 15 procedures. Non-judicial punishment under the provisions of Article 15 is the most important tool the commander possesses for handling minor disciplinary problems in his unit. The primary rules governing Article 15 are set forth in the Manual for Courts-Martial and implementing regulations. As a general matter, there is substantial room to revise these rules to meet operational needs without amending the UCMJ. In any case, it would not be wise to tamper with current law without first conducting a thorough evaluation of the need for change, to include staffing with the Joint Service Committee on Military Justice and the Code Committee.

VIEWS OF THE OPERATIONAL COMMANDER

Senator **Jepsen.** I would like to ask The Judge Advocates General whether you have solicited the views of the combat and operational officers on changes they feel are necessary to enhance the administration of military justice?

Could you please solicit their views and provide a list of recommended changes to the committee?

General **Clausen.** The Judge Advocate General is constantly soliciting the views of operational commanders and combat officers. Through Article 6 visits and commanders' conferences, The Judge Advocate General continuously supervises and monitors the administration of military justice. These amendments address not all, but many of the commanders' concerns. For example, there is general concern about the insanity defense, and possible changes to this defense are now under study. However, the present proposals represent the most urgent changes. These changes, which are needed now, have all been carefully evaluated.

Admiral **JENKINS**. The combat and operational commanders are in general agreement that the military justice system has become too complicated, time-consuming, and not responsive to the best interests of good order and discipline. They feel that during combat operations these problems will be exacerbated, and that the system may very well fail to meet the needs of the operational mission. In particular, the commanders are concerned that the ability to refuse nonjudicial punishment and summary courts-martial will be disruptive to operations, jeopardize good order and discipline within the command, and divert important material and manpower assets from operations to the processing of courts-martial. The experience of the Navy in the recent Indian Ocean crisis emphasized many of these military justice shortcomings and placed a severe strain on the ability of the Navy to adequately respond to the military justice and discipline needs of the commanders. Commanders are in agreement that the system needs an overhaul to curtail the pre- and post-trial delays and to provide a system which responds quickly and fairly to the needs of the commander and to the accused. Operational commanders also do not feel the nonjudicial punishment currently meets their needs to maintain good order and discipline within their commands. The effectiveness of nonjudicial punishment is the prompt disposition of minor offenses. The timeliness and certainty of punishment are important factors to correct the individual and to establish a deterrent effect for the command. To this end, commanders feel that the right of refusal of nonjudicial punishment at shore-based commands destroys the effectiveness of nonjudicial punishment. The commander must then refer the matter to a court-martial and be subject to the resultant delays and uncertainties. Commanders also feel that the authority to impose confinement at nonjudicial punishment is a tool that would enhance the effectiveness of nonjudicial punishment.

General **BRUTON**. The last sentence of Article 6(a) of the code requires the Judge Advocates General to "make frequent inspections in the field in the supervision of the administration of military justice." We take this responsibility very seriously, and we consult both judge advocates and commanders on those trips. We also exchange ideas in annual conferences of staff judge advocates of and within the major commands. From time to time, I ask both field commanders and staff judge advocates for their position on various proposals as they arise. It is my impression after 2 years that neither commanders nor staff judge advocates are united in support of any major changes proposed by S. 2521 to the code except on the proposal to increase the jurisdiction of special courts-martial, on which I polled commanders through their staff judge advocates before these hearings. On all other issues, one finds the disparity of views that one would expect to find in other areas, and that leads me to conclude that the code requires no changes beyond those that we have proposed.

NONJUDICIAL PUNISHMENT

Senator **JEPSEN**. As long as the committee is considering various changes to the Code, can you advise us whether the current structure of Article 15, nonjudicial punishment, meets the needs of the operational commander?

Mr. **TAFT**. The Code Committee has not brought to my attention any official information which indicates the services are experiencing any difficulties with current Article 15 procedures. Non-judicial punishment under the provisions of Article 15 is the most important tool the commander possesses for handling minor disciplinary problems in his unit. The primary rules governing Article 15 are set forth in the Manual for Courts-Martial and implementing regulations. As a general matter, there is substantial room to revise these rules to meet operational needs without amending the UCMJ. In any case, it would not be wise to tamper with current law without first conducting a thorough evaluation of the need for change, to include staffing with the Joint Service Committee on Military Justice and the Code Committee.

DESIGNATION OF COUNSEL

Senator **JEPSEN**. Under Article 27, your proposal would have the designation of counsel be made in accordance with Secretarial regulations. Should the designation of associate defense counsel under Article 38 also be made in accordance with Secretarial regulations?

Mr. TAFT. Counsel and assistant counsel are detailed under Article 27 of our bill in accordance with Secretarial regulations. If the accused obtains individual military counsel under Article 38, and requests retention of his detailed counsel as associate defense counsel, it is our view that the convening authority will be in the best positon to make the assessment as to whether the accused should be represented by two attorneys, each of whom may have a different supervisor. We would not object, however, if the legislation permitted this determination to be made in accordance with Secretarial regulations.

APPEAL BY THE GOVERNMENT

Senator JEPSEN. Should the amendment to Article 62 concerning government appeal contain a requirement that the trial counsel certify to the military judge that the appeal is not taken for the purpose of delay and that the evidence is essential to the case? *See* North Carolina General Statutes 15A–979(c). Could this be accomplished in the Manual for Courts-Martial rather than in the UCMJ?

Mr. TAFT. In federal civilian prosecutions, 18 U.S.C. § 3731 requires the government attorney to certify to the court "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." We would not object if the amendment to Article 62 were to contain such a requirement. Alternatively, such a requirement could be set forth in the Manual for Courts-Martial as part of the President's responsibility to provide rules for trial procedure under Article 36.

RECORD OF TRIAL

Senator JEPSEN. Should the record of trial be prepared before the convening authority takes action on the case under Article 60?

Mr. TAFT. Under both our proposal and under S. 2521, the convening authority is not an appellate reviewing tribunal; rather, he acts on the sentence solely as a matter of command prerogative. He cannot increase the sentence beyond the sentence adjudged at trial. If the convening authority determines that all or part of the record is necessary for the exercise of command prerogative, or if the accused requests a specified portion of the record in order to prepare his sentencing submission, those aspects of the record will be prepared under procedures that will be set forth in the Manual for Courts-Martial. If the accused, however, is satisfied that the convening authority can act on the case adequately on the basis of the matters set forth in the accused's petition, the service record, and the findings of the court-martial, and the convening authority does not believe that these matters require further amplification, there is no need to prepare a complete record of trial before the convening authority acts.

ACTION BY THE CONVENING AUTHORITY

Senator JEPSEN. Who will compile the information to be used by the convening authority in acting on the case?

Mr. TAFT. The information will be compiled by the convening authority's staff judge advocate or legal officer in accordance with procedures that will be set forth in the Manual for Courts-Martial.

LEGAL REVIEW BY THE CONVENING AUTHORITY

Senator JEPSEN. To what extent do accused persons now receive relief as a result of disapproval of findings by convening authorities acting in an appellate review capacity in the field?

Mr. TAFT. The following data is available for the Navy for calendar year 1981: in 1,881 special courts-martial, the convening authority disapproved a finding in only three cases; in 164 general courts-martial, the convening authority disapproved a finding in only one case. The data base from which these figures were derived does not indicate whether there was a sentence reduction in the four cases. The Army surveyed three large installations, Fort Hood, Fort Bragg, and Fort Knox, encompassing six general court-martial jurisdictions, for calendar year 1981. Out of 373 special courts-martial in which a bad-conduct discharge was adjudged, a finding was disapproved by the convening authority in two cases. There was no sentence reduction in either case. Out of 163 general courts-martial resulting in a conviction, the convening authority disapproved a finding in one case. In that case, the confinement was reduced by the convening authority from 18 months to 15 months.

WAIVER OF THE RIGHT TO APPEAL

Senator JEPSEN. Should an accused be permitted to waive his appellate rights as part of a negotiated pretrial agreement?

Mr. TAFT. Under our bill, the decision as to whether the case should be appealed will not be made by the accused until after the convening authority takes his action. Nothing in our bill changes current military law precluding pretrial agreements that involve a forfeiture of the right to appeal, the right to representation by military appellate counsel, and the right to consideration by a Court of Military Review of sentence appropriateness. *See United States* v. *Mills*, 12 M.J. 1 (C.M.A. 1981). It should be noted, however, that a plea of guilty bars appellate review of most issues, except for matters such as voluntariness of the plea, competence of defense counsel, and the government's compliance with the terms of a pretrial agreement. *See, e.g., Blackledge* v. *Allison*, 431 U.S. 63 (1977), *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Fontaine* v. *United States*, 411 U.S. 213 (1973); *Santobello* v. *United States*, 404 U.S. 257 (1971); *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *United States* v. *Joseph*, 11 M.J. 333 (C.M.A. 1981).

A PUNITIVE ARTICLE ON DRUGS

Senator JEPSEN. What is your view on the punitive article on drugs set forth in Chief Judge Everett's statement before this subcommittee on September 16, 1982?

Mr. TAFT. Executive Order 12383, 47 Fed. Reg. 42137 (1982), amending the Manual for Courts-Martial, addresses our needs. We would have no objection to the amendment as proposed by Chief Judge Everett, if it were amended by striking out ", Without a valid prescription or other legal authorization of justification," and by inserting "wrongfully" in lieu thereof. This would avoid the implication that the government will be required to prove the absence of a legal authorization or justification. Instead, use of the word "wrongfully" would permit the government to rely on the inference of wrongful possession in the absence of evidence to the contrary, particularly if Congress makes it clear that the change to the UCMJ would be consistent with the definitions and inferences in the amendments to the Manual for Courts-Martial in Executive Order 12383.

PREEMPTION OF DRUG-RELATED OFFENSES

Senator JEPSEN. Would such an article preempt the prosecution of drug-related offenses under Article 134 or prosecutions under Article 92 for violation of service regulations concerning drugs, drug use or drug paraphernalia?

Mr. TAFT. The preemption doctrine does not apply unless Congress intends a specific "punitive article to cover a class of offenses in a complete way." *United States* v. *Kick*, 7 M.J. 82, 85 (C.M.A. 1979). The preemption doctrine will not apply if the legislative history makes it clear that the new article does not preempt prosecution of drug paraphernalia offenses, nor does it preempt prosecution of other drug-related offenses under Articles 92 and 134 when such offenses are not covered by the new article.

DISCHARGE REVIEW

Senator JEPSEN. Do you have any statistics concerning the number of special courts-martial cases reviewed by the Discharge Review Boards and the number in which relief is granted?

Mr. TAFT. In the Army, ten special courts-martial were reviewed during calendar year 1980. None of the cases resulted in a grant of relief. For the period from 1950–80, there were 1,587 applicants concerning special courts-martial cases. During that 30-year period, relief was granted in 77 cases. The Navy does not keep separate statistics for court-martial cases. Its overall upgrade rate is 14 percent, and it estimates that the rate in court-martial cases is significantly lower. The Air Force Discharge Review Board reports that 39 special courts-martial cases were reviewed in 1981. Six were upgraded to General; one was upgraded to Honorable.

Senator JEPSEN. Will elimination of Discharge Review Board jurisdiction over special courts-martial remove any important safeguard as to the rights of military accused?

Mr. Taft. Under our proposal the accused who receives a bad-conduct discharge from a special court-martial is represented by qualified counsel in a trial in which a military judge presides in virtually all cases. His case will be reviewed for clemency and as a matter of command prerogative by the convening authority. The case is then subject to review on issues of law, fact, and sentence appropriateness by the Court of Military Review. Errors of law may be subject to further review in the Court of Military Appeals and the Supreme Court. After direct review is completed, the accused may petition the Service Secretary for clemency under Article 74, and may subsequently seek clemency from the Correction Boards under 10 U.S.C. § 1552. At the present time, the Discharge Review Boards may review a bad-conduct discharge imposed by a special court-martial for purposes of clemency. As illustrated by the data provided in response to a previous question, military accused do not submit a significant number of applications for such review. The DRBs grant the applicant a hearing as a matter of right (whereas the Correction Boards generally resolve cases on the basis of a records-only review). However, considering the multiple layers of review otherwise available to the accused in which he has a hearing as of right, we do not believe that elimination of DRB jurisdiction over courts-martial removes an important safeguard as to the rights of the accused; rather, it eliminates a review procedure that was established prior to enactment of the UCMJ, and which has outlived its usefulness in light of the many protections afforded the accused under the UCMJ.

SIZE AND STATUS OF THE COURT OF MILITARY APPEALS

Senator Jepsen. Does the Department of Defense still favor a 5-member court, as proposed in 1980 and approved by the House? Do you still favor complete administrative independence for the Court of Military Appeals as set forth in that legislation?

Mr. Taft. The goal of the 5-member court is stability in the Court's membership, which will have the long-term benefit of strengthening the precedential value of the Court's opinions. We have had a stable court since 1980, and the earliest that the term of any of the present judges will expire is 1986. Although we continue to believe that a 5-judge court is desirable, we do not think that the composition of the court should be changed until there is a vacancy on the court. To increase the size of the Court before then would be to introduce the very instability we are trying to avoid.

The Court of Military Appeals is an independent tribunal, and we respect that independence. Under Article 67 of the UCMJ, the Court is located in the Department of Defense "for administrative purposes only." With the support of the Court, we proposed legislation in 1980 to give the Court complete statutory independence. The Court has not asked us to reintroduce that legislation in the 97th Congress. We would have no objection to such legislation.

SUPREME COURT REVIEW

Senator Jepsen. Is the concept of Supreme Court review consistent with the intent of Congress in establishing the Court of Military Appeals as the highest court in the military justice system?

Mr. Taft. Prior to the enactment of the UCMJ in 1950, civilian court review of courts-martial was virtually non-existent, with very limited review over questions of jurisdiction. Indeed, even within the armed forces, review of courts-martial prior to enactment of the UCMJ did not involve formal advocacy before appellate tribunals. Congress changed that in 1950, by creating an independent civilian tribunal, the Court of Military Appeals.

The Court of Military Appeals regularly interprets federal statutes, executive orders, departmental regulations, and it also determines the applicability of constitutional provisions to members of the armed forces. The decisions of the Court are of considerable importance to our nation because they impact directly on the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system. Because the Court of Military Appeals has institutionalized civilian judicial review of courts-martial, the authority for the Supreme Court to review decisions of the Court of Military Appeals is a natural step in the evolution of the military justice system. As I noted in my statement, the Court of Military Appeals will remain the primary judicial authority on the UCMJ because it is unlikely that the Supreme Court will grant review in any but the most important cases. Accordingly, there is no reason to believe that the proposal will substantially change the military justice system as we know it today.

The Court of Military Appeals is an independent judicial tribunal. It has demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations, and to interpret provisions of the UCMJ in a manner that adds procedural requirements or limitations. Such a development is a natural outgrowth of the creation of a civilian tribunal. Although we may object to certain decisions, we support the Court as an institution. When the Court overturns a rule or adds to a statute on nonconstitutional grounds, we can amend the rule or seek a congressional amendment. However, the absence of Supreme Court review means that we cannot obtain judicial review of a decision by the Court of Military Appeals. This means that the Court of Military Appeals can render a decision as a matter of constitutional law interpreting a rule or statute in a manner that we would consider inconsistent with the views of the intent of Congress or the views of the Supreme Court, and we would not be able to obtain Supreme Court review. When I was General Counsel at the Department of Health, Education, and Welfare, I would have found it unthinkable that a court could have held one of our regulations to be unconstitutional, and that we would not have had the opportunity to seek review by the Supreme Court. The rules of the Department of Defense, which go to the heart of the disciplinary process, certainly are no less important.

The existence of a specialized tribunal does not militate against Supreme Court review. The new Court of Appeals for the Federal Circuit is quite specialized, combining the jurisdiction of the former Court of Claims and Court of Customs and Patent Appeals. I cannot conceive of any reason why the Supreme Court should be considered competent to exercise its discretion to review decisions of the Court of Customs and Patent Appeals, but not decisions of the Court of Military Appeals. In practice, the Supreme Court has reviewed only a handful of cases from the Court of Customs and Patent Appeals every decade, leaving that court as the primary authority within its specialized jurisdiction. The same is likely to be true with respect to the Court of Military Appeals, given the limited number of military cases in which the Supreme Court is likely to grant review.

In addition, as noted in *Middendorf* v. *Henry*, 425 U.S. 25 (1976), the Supreme Court will not necessarily defer to the Court of Military Appeals on issues of constitutional law raised through collateral attack. Under the current state of affairs, this means that the accused, but not the government, may initiate actions invoking the Supreme Court's jurisdiction. That is an unsatisfactory way to manage a system of judicial review.

Senator JEPSEN. In your judgment, have there been any cases in recent years in which there is a reasonable likelihood that the Supreme Court would have granted review had the authority set forth in your bill been in existence?

Mr. TAFT. In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), the Supreme Court granted review and overturned a lower court decision that had invalidated the UCMJ's provision for summary courts-martial without the right to counsel. The Court of Military Appeals had reached the same conclusion as the lower court in *United States* v. *Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973), and it is reasonable to believe that the Supreme Court would have granted review and overturned the Court of Military Appeals decision.

There have been other cases, however, in which the absence of a parallel collateral attack has left the government without a means of seeking review of an adverse decision of the Court of Military Appeals on vital issues. This has been a particular problem with respect to matters related to drug abuse. In one line of cases, the court held that courts-martial had no jurisdiction over most off-post drug offenses, including those involving a military police officer and his subordinates. *E.g., United States* v. *Corn*, 6 M.J. 351 (C.M.A 1979). In another line of cases, the Court substantially limited the ability of the government to use the results of routine administrative inspections as evidence in courts-martial. *See e.g., United States* v. *Thomas*, 1 M.J. 397 (C.M.A. 1976); *U.S.* v. *Roberts*, 2 M.J 31 (C.M.A. 1976). Fortunately, subsequently decisions have ameliorated the negative impact of these decisions. *E.g., United States* v. *Trottier*, 9 M.J. 337 (C.M.A. 1980) (court-martial jurisdiction extends to virtually all off-post drug offenses); *United States* v. *Middleton*, 10 M.J. 123 (C.M.A. 1981) (sustaining use in courts-martial of the fruits of a commander's traditional inspection). For the purposes of this question, however, it is important to note that these decisions illustrate the vital issues considered by the Court of Military Appeals. Although we cannot say with absolute certainty that the Supreme Court would have granted review in the above cases, or that it would have ruled in the government's favor if review had been granted, it is certain that the absence of Supreme Court review meant that the government had no choice but to accept those decisions and their restrictive effect on our ability to counter drug abuse in the military.

Senator JEPSEN. What is the position of the American Bar Association on the issue of Supreme Court review?

Mr. TAFT. In 1979, the House of Delegates of the ABA endorsed creation of appellate jurisdiction in the Supreme Court to review decisions of the Court of Military Appeals upon writ of certiorari. The ABA Standing Committee on Military Law submitted a letter in favor of legislation to accomplish that goal to the House Armed Services Committee on February 7, 1980. The ABA reiterated this position in testimony before your Subcommittee on September 16, 1982.

SIZE OF THE COURT OF MILITARY APPEALS

Senator JEPSEN. What is the position of the American Bar Association on the size of the Court of Military Appeals?

Mr. TAFT. On February 7, 1980 the ABA's Standing Committee on Military Law submitted a letter to the House Armed Services Committee in favor of pending legislation to increase the size of the Court to 5 judges.

REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Senator JEPSEN. Should reviews in the Office of The Judge Advocate General be conducted only by persons certified as military judges (even though not necessarily designated as military judges at the time of such service?)

Mr. TAFT. There is no need to require that review in the Office of The Judge Advocate General be conducted only by persons certified as military judges. Such reviews are conducted by experienced judge advocates with extensive background in military criminal law. For example, in the Army, all case reviewed by The Judge Advocate General are forwarded to the Examination and New Trials Division, which is currently headed by a retired colonel (who was formerly a judge on the Army Court of Military Review), and to which are currently 4 judge advocates, all of whom are lieutenant colonels. That office carefully examines each case, and prepares a written opinion as appropriate. That opinion is forwarded through the Chief of the Criminal Law Division, who is a colonel, for his consideration and recommendations, and then through two General Officers before it reaches The Judge Advocate General for his action.

Within the naval service, the review functions of The Judge Advocate General pursuant to Article 69, UCMJ, are performed by the Deputy Assistant Judge Advocate General (Military Justice). The officer assigned to these duties is a senior judge advocate, normally an O-5 or O-6, with extensive experience and background in military justice matters. The incumbent is an O-6 and a former judge of the Navy-Marine Corps Court of Military Appeals. All judge advocates assigned to the Military Justice Division are experienced in military justice with a variety of backgrounds as military judge, appellate counsel, staff judge advocate, and as a trial or defense counsel. It is not considered necessary nor desirable to restrict the assignment for review to only persons certified as military judges. As a practical matter, the assignment of the review functions will, in most cases, be to a judge advocate certified as a military judge; however, from a personnel manning and management standpoint, such an assignment may not always be practicable. Similar considerations apply to the Air Force.

QUESTIONS SUBMITTED BY SENATOR J. JAMES EXON

CONSISTENCY WITH MANUAL REVISION

Senator EXON. I understand that work presently is ongoing with respect to a major revision to the Manual for Courts-Martial. How do the changes proposed by the DOD proposal and S. 2521 fit in with the efforts to revise the Manual?

Mr. TAFT. The Manual for Courts-Martial contains the rules promulgated by the President under Article 36, UCMJ (pretrial, trial, and post-trial rules), Article 56, UCMJ (table of maximum punishments), and the President's authority as Commander-in-Chief. The Manual is being revised completely to accomplish the following major goals:

1. Provide for compliance with the mandate of Article 36 (that courts-martial use the rules applicable in Federal criminal trials insofar as the President deems practicable and not contrary to or inconsistent with the UCMJ);
2. Clearly separate binding rules from nonbinding commentary;
3. Review current rules to make sure that they comply with the mandate of Article 36;
4. Ensure that the rules adequately account for the disciplinary needs of the armed forces in times of war and in times of peace; and
5. Make appropriate revisions to accommodate changes in caselaw and practice since the 1969 revision to the Manual.

The administration's bill, and the general principles set forth in S. 2521, are consistent with these goals. Any changes made to the Manual to implement these amendments could be incorporated in the overall Manual revision.

SUPREME COURT REVIEW

Senator **Exon.** Gentlemen, the DOD proposal would permit direct review by the U.S. Supreme Court of certain decisions of the U.S. Court of Military Appeals. Review would be sought via petitions for a writ of certiorari. Mr. Taft, how many such petitions does the Department estimate would be filed with the Supreme Court each year? Approximately what percentage of the Supreme Court's current certiorari docket would this number constitute? Based on current experience how many petitions each year do you expect would be granted by the Court?

Mr. **Taft.** The number of cases in which a petition for certiorari will be filed depends on the number of cases submitted to the Court of Military Appeals in a given year, the types of issues that arise, the action of the Supreme Court on other military or criminal law cases, and other factors that do not lend themselves to easy quantification.

From a broad perspective, there are several ways to look at this problem. The first involves the impact on the number of cases potentially subject to Supreme Court review. In that last year for which data are available, the United States Courts of Appeal terminated 27,984 cases [1] all of which were subject to Supreme Court review. By contrast, 162 cases [2] from the Court of Military Appeals would have been subject to review by the Supreme Court. This means that our bill would produce an increase of only 0.58 percent in the cases potentially coming from the Courts of Appeal to the Supreme Court.[3]

A second approach involves an examination only of those cases on the Supreme Court's docket. The Supreme Court docketed 4,417 cases during 1981. In the last five years, the number of cases reviewed by the Court of Military Appeals that would have been eligible for Supreme Court review under our bill would have ranged from a high of 440 in 1978 to a low of 143 in 1979, with an average of 280 cases. If review were sought in every case, this would affect the number of certiorari petitions filed with the Supreme Court in the range of 3 to 10 percent per year. The average increase would have been 6.3 percent.

The actual number is likely to be considerably less based on the following factors:

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[1] Year ending June 30, 1982.

[2] Year ending September 30, 1981.

[3] The number of cases potentially subject to direct review in the Supreme Court is much greater than the number of cases heard upon appeal from the United States Courts of Appeals in the year ending June 30, 1982. Direct review in the Supreme Court is permitted in the following other cases: a lower Article III Court decision invalidating an Act of Congress when the United States is a party; a decision of a three-judge district court; a decision of the Court of Appeals for the Federal Circuit (formerly the Court of Customs and Patent Appeals and the Court of Claims, whose decisions were not counted in the federal circuit decisions for 1982); and decisions of the Supreme Court of Puerto Rico and the highest court of a State that turn on questions of federal law. Because state decisions involving federal law are not subject to separate statistical measurement, we cannot give a reliable estimate of the total number of cases potentially subject to direct Supreme Court review. It is reasonable to assume, however, that these figures would add subsiantially to the 27,984 cases heard in the United States of Courts of Appeals, thereby further diminishing the relative proportion of military justice cases that would be subject to direct review below .05 percent.

The Court of Military Appeals normally issues only slightly more than 100 written opinions a year.

The Solicitor General is likely to exercise firm control over government petitions.

The mere availability of review does not mean that every accused will seek review in the Supreme Court. For example, even though any accused can petition the Court of Military Appeals at government expenses to review an adverse decision by a Court of Military Review, such petitions are filed in only about half the cases decided by the Courts of Military Review. Although it would be speculative at best to translate these figures into a firm prediction of the impact on the Supreme Court, these figures suggest that number of petitions is likely to be kept to a reasonable figure.

With respect to the number of petitions that are likely to be granted by the Supreme Court, I would like to reiterate that aspect of my prepared statement in which I emphasized that it is not our intention to displace the Court of Military Appeals as the primary interpreter of military law. The Solicitor General will ensure that the government only seeks review in occasional cases of great importance. The Supreme Court does not grant review in many cases. In 1981, for example, the Court granted review in only 210 cases. The Supreme Court repeatedly has emphasized the unique nature of military law. In such circumstances, and it is unlikely that the Supreme Court will grant review in a substantial number of military justice cases. The Court of Military Appeals, like the highest court of a state, will continue to be the principal source of authoritative interpretations of the law.

Senator Exon. Under the proposal military lawyers could play a role in military justice cases which are taken to the Supreme Court. Has there been any estimate of the impact of this additional workload on our existing military legal resources? Will we need more military lawyers to do this job?

Mr. Taft. We do not anticipate a significant workload, nor do we presently see a need for any increase in military lawyers to do this job. Each service now maintains government and defense appellate organizations that process thousands of cases each year before the Courts of Military Review and the Court of Military Appeals. Current Supreme Court rules limit petitions to 30 pages. 40 copies must be filed. Those requirements are relaxed when the accused meets the Supreme Court's indigency standards. The respondent can file an opposing brief subject to the same requirements. Often, the government does not even bother to file an opposing brief because it is apparent that the case is not of a nature that is likely to attract the votes of four Jusices for a grant of review. Further matters (reply briefs and supplemental briefs) are limited to 10 pages. There will be no other significant costs under our legislation. These requirements, including the time of counsel and support staff, should not add appreciably to the cost of maintaining the current appellate activities of the services. For example, more than 8,797 cases were filed with the Courts of Military Review and Court of Military Appeals in 1981, but only 162 cases from the Court of Military Appeals would have been eligible for direct review in the Supreme Court. Even if petitions were filed in all cases, this amounts to less than 2 percent of the cases for which the appellate divisions would be responsible. The actual costs are not likely to be significant, particularly since the primary legal work in the case will have been done in preparation of the petition for review and briefs filed with the Court of Military Appeals.

Senator Exon. Several members of the Supreme Court have spoken out in rather candid fashion about the Supreme Court's workload. Justice Stevens has been quoted as saying that the Court is "too busy" and specifically cited the certiorari docket. (U.S. News & World Report, August 23, 1982, p. 52). In view of these comments has the Supreme Court been formally asked for a position on the DOD proposal? If not, why not?

Mr. Taft. The responsibility within the executive branch for assessing the impact of legislation on the Supreme Court rests with the Department of Justice. It is not the practice of the Department of Justice to seek the views of the Supreme Court on legislative proposals, and they did not seek the views of the Court on this bill. It should be noted, however, that the Department of Justice has been extremely protective of the jurisdiction and workload of the Supreme Court.

The portion of our bill dealing with Supreme Court review was first staffed within the executive branch during the 96th Congress. At that time, the Department of Justice recommended limiting the opportunity for Supreme Court review along the lines now set forth in our bill in order to ensure that the legislation did not add substantially to the workload of the Supreme Court. That legislation was cleared by the Office of Management and Budget in 1980 and was approved without dissent by the House near the end of the 96th Congress; the session ended before the Senate could give consideration to the bill. The legislation was reviewed by the Judicial Conference of the United States, chaired by Chief Justice Burger, in 1980. The Conference expressly declined to take a position on this matter, suggesting it was a subject to be considered by the Supreme Court. The Court, however, has not taken a position since that time. Prior to reintroduction of the legislation in 97th Congress, the bill was recoordinated with the Department of Justice. During the entire period of internal coordination and public debate during the last two sessions of Congress, no expression of disapproval has been made by the Supreme Court.

The impact on the Supreme Court's docket was considered carefully when the bill was drafted. This is illustrated by contrasting the limits in our bill to the absence of limits on the reviewability of final decisions from the United States Courts of Appeals. Similarly, there is no limit on review of decisions of the highest court of a state (or the Supreme Court of Puerto Rico) that turn on questions of federal law. As noted in our answer to a previous question, there were over 27,000 cases terminated last year just from the United States Courts of Appeals. A petition for certiorari may be filed in such cases no matter how insubstantial the issue.

Our bill, however, insures that the case will not be subject to Supreme Court review if the Court of Military Appeals has not granted review. In 1981 for example, the Court of Military Appeals terminated 2,128 petitions for review and petitions for extraordinary relief by declining to grant review, while it heard only 162 cases that would have been subject to review in the Supreme Court under our bill. In other words, our bill would have authorized review in only about 7 percent of the cases before the Court of Military Appeals, whereas a petition for certiorari can be filed in every case terminated by the United States Courts of Appeals without regard to the relative importance of the cases.

Mr. EXON. If there has been no formal request for a Supreme Court position, can you state for the record—on behalf of that Court—their position on this proposal? What is it and what is the basis for your statement?

Mr. TAFT. The Supreme Court is part of the judicial branch of government, and we would not presume to speak for the Court on this issue. It should be noted, however, that the primary concerns expressed by various members of the Court have involved the lack of finality in criminal cases, the need for exhaustion of administrative remedies, the growing number of issues that are subject to litigation, and the burden of resolving conflicts among the circuits on minor statutory questions. Our proposal, however, involves direct review of the decisions of a single court, the Court of Military Appeals.

The Supreme Court has made it quite clear that it considers itself the final authority on questions of law involving members of the armed forces. In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), a collateral attack on the denial of the right to counsel in summary courts-martial, the Supreme Court rejected previous decisions of the Court of Military Appeals concerning the applicability of the Sixth Amendment right to counsel in courts-martial. The Supreme Court, holding that summary courts-martial may be conducted without the presence of counsel, noted that when "[d]ealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference," but that the same degree of deference is not required in questions involving the determinations of Congress as to the constitutional rights of members of the armed forces. Had it not been for a fortuitous parallel federal district court collateral attack on the congressional determination as to summary courts-martial,* the government would have been unable to challenge the ruling of the Court of Military Appeals on this constitutional issue.

**Background Note:* Three years before *Middendorf* v. *Henry* was decided, the Court of Military Appeals reached the opposite conclusion in *U.S.* v. *Alderman*, 22 C.M.A. 298, 46 C.M.R. 298 (1973). In *Alderman*, the Court held that a special court-martial's use in sentencing of a summary court-martial conviction in which the accused had not been represented by counsel violated the Supreme Court's ruling in the civilian case of *Argesinger* v. *Hamlin*, 407 U.S. 25 (1972) (defendant has a constitutional right to counsel in misdemeanor trials when confinement is imposed). The government had no way to appeal the decision in *Alderman*. Prior to the *Alderman* decision, however, a collateral challenge to summary courts-martial without counsel had been filed in federal district court in the *Henry* case; both the district court and court of appeals invalidated that portion of the UCMJ permitting summary courts-martial without counsel.

Disapproval of this legislation would be saying, in effect, that any accused potentially can raise a constitutional issue to the Supreme Court, but the government—no matter how important the interests affected by a lower court decision—never can initiate an appeal to obtain a decision by the Supreme Court on a constitutional issue. Given the strong support the Supreme Court has shown for the government's interests in the military justice system, it is difficult to conceive of the Supreme Court opposing some sort of power to review decisions of the Court of Military Appeals.

Senator EXON. Finally, are there any other Article I courts (*i.e.*, courts like the U.S. Court of Military Appeals) whose decisions are not subject to review by the Supreme Court? What are those courts?

Mr. TAFT. There are no other courts created by Congress under Article I of the Constitution whose decisions are not subject to review by the Supreme Court.

SENTENCING BY MILITARY JUDGES

Senator EXON. Would DOD or the TJAGS favor a system whereby the accused had an opportunity to waive sentencing by a military jury and be sentenced by a military judge? If not, why not?

Mr. TAFT. We would not favor such a proposal. One of the primary arguments for sentencing by judge alone is that it will promote consistency in sentencing. This would be undermined if the accused were allowed to choose the sentencing authority. If sentencing by the judge in noncapital cases is adopted, it should apply to all cases.

Senator EXON. Approximately what percentage of all courts-martial are currently presided over by military judges?

Mr. TAFT. Army: General Courts-Martial: 57 percent; Special Courts-Martial (BCD): 67 percent; Special Courts-Martial (non-BCD): 71 percent. Average of all General and Special Courts-Martial: 63 percent.

Navy: General Courts-Martial: approximately 60 percent; and Special Courts-Martial: approximately 90 percent.

Air Force:

[In percent]

	General courts-martial	Special courts-martial	Combined special and general courts-martial
Calendar year:			
1977	46	44	44
1978	34	41	40
1979	44	45	45
1980	49	54	53
1981	61	57	57
1982[1]	49	61	58
1977–82 average	50	51	50

[1] Through May 14, 1982.

APPEAL BY THE GOVERNMENT

Senator EXON. Who determines whether a particular order meets the criteria for the government to be able to exercise its right appeal? Is that decision reviewable in the military justice appellate system?

Mr. TAFT. The decision to appeal will be made by the trial counsel as representative of the government. The Manual for Courts-Martial and service regulations will provide procedural requirements for approval by appellate counsel, who represent the government before the Courts of Military Review under Article 70, before an appeal is filed. Further appeal to the Court of Military Appeals will be subject to additional procedural requirements for approval under the Manual for Courts-Martial and service regulations. The determination as to whether the appeal meets the criteria of Article 62, as proposed, will be subject to review by appellate authorities.

REVISIONS TO THE CONVENING AUTHORITY'S ROLE IN PRE- AND POST-TRIAL REVIEW PROCESS

Senator EXON. Is there evidence that convening authorities are increasingly less able to perform the tasks as allocated to them under existing law? What evidence?

Mr. **Taft**. We have full confidence in the capabilities of our convening authorities and their ability to perform assigned tasks in the military justice system. The issue is not one of capability; rather, it is the question of whether commanders, whose operational and administrative responsibilities have grown increasingly complex, should be required to make judicial determinations as to matters in which they normally rely on the advice of their staff judge advocates and the rulings of military judges.

When courts-martial were composed of laymen and cases were tried by lay officers, there was a basis for requiring legal review in the field and action on issues of law by the convening authority. Today, virtually all cases are tried before military judges and qualified attorneys, and all cases that would have required a post-trial review will be subject to consideration in a Court of Military Review, where the parties are represented before the judges by appellate counsel. In that context, a legal review by the convening authority is unnecessary.

The commander will retain the central role. He will receive whatever matters are filed by the accused on the issue of sentencing; in cases that would have received a post-trial review under current law, he will receive an SJA's recommendation, as well as the accused's rebuttal. The Manual for Courts-Martial will provide detail as to what other materials he may consider in taking action on the case. He must approve any sentence, and may disapprove the findings and sentence in whole or in part as a matter of command prerogative. Under our bill, he remains the central figure in post-trial action, and we believe that our procedure will provide him with better information in a more useful format than he now receives.

Senator **Exon**. Mr. Taft, you state that both proposals "eliminate any requirement for the staff judge advocate to conduct a legal review of the case." What is the nature of the staff judge advocate's action which is the basis for his "recommendation" to the convening authority? If it is not a legal review, what precisely will the staff judge advocate do?

Mr. **Taft**. Under current law, the convening authority acts as an appellate authority, reviewing the rulings of the military judge on matters of law. The staff judge advocate provides him with an opinion that is used in exercising this appellate function.

This system was established prior to creation of the military judiciary and prior to the requirement that virtually all cases be tried by qualified judge advocates. Now that judges and lawyers are present in virtually all cases, and with the development of an extensive review system before qualified appellate authorities, there is no need for the convening authority to act as an initial appellate tribunal. As a matter of command prerogative, however, it is essential that the convening authority maintain the power to disapprove or modify the results of trial. The staff judge advocate, as the convening authority's senior advisor on military justice matters, is the person best qualified to make a recommendation to the convening authority as to how he should exercise his powers. The staff judge advocate's recommendation will include the results of trial (*i.e.*, findings and sentence), a summary of the member's service record, information concerning pretrial restraint, the pretrial agreement (if any), and any other matters which the staff judge advocate, in his discretion, determines to be relevant to the action of the convening authority. In addition, the accused's petition to the convening authority will be attached. The staff judge advocate, in his recommendation, may discuss matters in the accused's petition. Finally, it will contain a specific recommendation as to the sentence, along with any appropriate recommendations as to the findings.

Senator **Exon**. Mr. Taft, in your proposal, the convening authority may order "proceedings in revision prior to taking action" on the sentence or findings. What is the difference between a proceeding in revision and a rehearing? Why do you propose that the convening authority's power to order a rehearing be eliminated?

Mr. **Taft**. A proceeding in revision is conducted to correct a procedural omission or defect in the trial. It is used, for example, to correct a technical error in announcing the findings or sentence, or to clarify the accused's understanding of a pretrial agreement. It may not be used to correct substantial legal errors in the case, to decide contested issue, or to litigate new issues.

A rehearing is conducted when a substantial legal error has resulted in disapproval of the sentence or the findings. If only the sentence is disapproved a rehearing is conducted on the sentence. If the findings also are disapproved, the entire case must be retried.

Convening authorities now have the power to order rehearings as part of their responsibility to review the case for legal error. In practice, convening authorities rarely exercise the power to order rehearings. We recently checked with several major court-martial jurisdictions and found that in a one-year period only one rehearing had been directed by the convening authority as a result of his action on the case.

The power to order a rehearing is related to the review of the case for legal error. We want to take that requirement off the convening authority's shoulders. The power to order rehearings is exercised so infrequently that it is not worth retaining at a cost of requiring the convening authority to review each case for legal error. We would not object to allowing the convening authority to order rehearings in his discretion, so long as there is no obligation for him to review the case as an appellate tribunal or to review and act on petitions for rehearings.

Senator EXON. Mr. Taft, you state that the "President may prescribe the specific form and content of the [post-trial] recommendation" of the staff judge advocate. What would you envision being included in that recommendation if this will not be "a formal legal review of the proceedings?"

Mr. TAFT. The staff judge advocate, as the convening authority's senior advisor on military justice matters, is the person best qualified to make a recommendation to the convening authority as to how he should exercise his powers. The staff judge advocate's recommendation will include the results of trial (i.e., findings and sentence), a summary of the member's service record, information concerning pretrial restraint, the pretrial agreement (if any), and any other matters which the staff judge advocate, in his discretion, determines to be relevant to the action of the convening authority. In addition the accused's petition to the convening authority will be attached. The staff judge advocate, in his recommendation, may discuss matters in the accused's petition. Finally, it will contain a specific recommendation as to the sentence, along with any appropriate recommendations as to the findings.

Senator EXON. Please provide for the record a citation to the authority that failure to follow the pretrial requirements does not constitute jurisdictional error.

Mr. TAFT. United States 1. Ragan, 14 C.M.A. 119, 33 C.M.R. 331 (1963).

NOTICE AND WITHDRAWAL OF APPEALS

Senator EXON. Both S. 2521 and the DOD proposal would change the existing system of automatic, nonwaivable appellate review of specific cases by requiring that a notice of appeal be filed by an accused. A notice of appeal also would be required to obtain TJAG review under Article 69. Won't defense counsel—especially since obtaining a copy of the record is contingent on filing a notice of appeal—be inclined to file such notices in all eligible cases? If not, why not?

Mr. TAFT. I anticipate that a notice of appeal will be filed in a high percentage of cases. In view of the power of the Court of Military Review to review the case for factual as well as legal sufficiency, and for sentence appropriateness, I would expect that defense counsel would recommend filing such a notice. However, there are some accused who simply want to get the case over with and do not want to wait for further review. For example, during the first six months of 1982, the accused waived appellate counsel in 574 cases submitted to the Navy-Marine Corps Court of Military Review (8.9 percent). This suggests that there are a sufficient number of cases in which waiver is likely to warrant this procedure.

Moreover, we do not believe that the accused will file a notice of appeal simply to get a verbatim record. If the accused is sufficiently satisfied with the results of the proceedings and the convening authority's action to forego an appeal, it is likely that he will be satisfied with a summarized record.

Senator EXON. The DOD proposal is slightly different from S. 2521. What would happen in a case under the DOD proposal where neither a notice of appeal or an express waiver of the right to appeal were filed in a timely fashion?

Mr. TAFT. We think this is unlikely to happen. Military defense counsel are officers of the United States as well as officers of the court, and there is no reason to expect that they would neglect to perform an important duty. Of course, because our legislation requires an express waiver, the case will be submitted for appellate review by a Court of Military Review unless there is an express waiver.

AUTHORITY TO ORDER REHEARINGS AND PROCEEDINGS IN REVISION

Senator EXON. The DOD proposal eliminates certain authority for the convening authority to order a rehearing. S. 2521 would modify that authority to conform it with the notice of appeal system. Why should the authority currently contained in Article 63(a) be eliminated? Doesn't the existing provision give the convening authority the opportunity to shortstop a case at the last minute before it must go into the appellate process?

Mr. TAFT. This authority is rarely used, and will become unnecessary under our proposal because the convening authority no longer will review the rulings of the military judge on issues of law. If a substantial error were brought to his attention, by the accused or otherwise, the convening authority could disapprove affected findings or part of the sentence, as an exercise of his command prerogative, and moot the issue for further review. If the error is a procedural omission, he could direct a proceeding in revision, under which the court-martial could meet again. If the error could only be corrected by a rehearing, the convening authority would take action and forward the case to the Court of Military Review which could order a rehearing. We would not object to allowing the convening authority to order rehearings in his discretion, so long as there is no obligation for him to review the case as an appellate tribunal or to review and act on petitions for rehearings.

REHEARING: EFFECT OF CHANGE IN PLEA

Senator EXON. What is the scope of the problem of individuals not adhearing to a pretrial agreement at rehearing? Has the U.S. Court of Military Appeals dealt with this issue?

Mr. TAFT. Currently, if an accused pleads guilty pursuant to a pretrial agreement, the convening authority is obliged to approve only a certain sentence in accordance with limits in the agreement. If, on review before the Court of Military Review or Court of Military Appeals, the accused successfully attacks his conviction, a rehearing may be ordered. At that hearing, the accused may plead not guilty, and still be assured that he will receive no sentence in excess of that approved by the convening authority under the agreement. For example, an accused may plead guilty to robbery and receive a sentence of a dishonorable discharge, total forfeiture of pay and allowances, and confinement for 3 years. He may have had a pretrial agreement that the convening authority would not approve any sentence in excess of a bad conduct discharge, total forfeiture, and confinement for 18 months. When the convening authority takes action in accordance with the pretrial agreement, that becomes the maximum sentence which can be imposed at any rehearing, even if the accused effectively withdraws from the agreement by attacking his plea on appeal and pleading not guilty at a rehearing. Under the proposal the accused could not receive a greater sentence than the one adjudged at the first trial, but the convening authority's action under the agreement would not affect the second trial.

The Court of Military Appeals has not considered this precise issue, but it has ruled that the convening authority on rehearing may not approve a sentence that is more severe than the sentence approved by the convening authority after the first trial. *United States* v. *Jones*, 10 C.M.A. 532, 28 C.M.R. 98 (1959).

EXTENSION OF SENTENCES

Senator EXON. Describe the problems or reasons for the changes proposed by DOD to current law regarding execution of sentences subject to Presidential or Secretarial approval. What is your understanding of the policy behind the original enactment of those provisions as presently written?

Mr. TAFT. Under current law, a sentence extending to death may not be executed until approved by the President. The President has specified clemency powers. A sentence extending to dismissal cannot be executed until approved by the Secretary concerned. A punitive discharge or confinement for 1 year or more may not be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals. However, under Article 57, a sentence to confinement becomes effective (even though not technically executed) as soon as adjudged by the court-martial; forfeitures become effective when approved by the convening authority if the case also involves confinement. Under Article 58a, if the sentencing includes a punitive discharge, confinement, or hard labor without confinement, an enlisted person is reduced automatically to grade E-1 upon the convening authority's approval of the sentence, except as otherwise provided in service regulations.

The current formulation contains an unnecessary ambiguity between the limitations on execution of a sentence under Article 71 and the affirmative authority to impose punishment under Articles 57 and 58a. It also unnecessarily links the effective date of forfeitures to the fact of confinement. The effective date of forfeitures should begin upon approval of the sentence by the convening authority, regardless of whether the case also involves confinement. The original intent of Congress was to insure that the death penalty would not be imposed prior to Presidential review; that officers would not be dismissed without review of their cases by the Secretary; and that punitive discharges would not be executed without a legal review. H.R. Rep. No. 491, 81st Cong., 1st Sess. 33 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 30 (1949). Our proposal is consistent with that intent. The reasons for permitting forfeitures to become effective upon the convening authority's action only in the case of confinement involved a desire to preclude receipt of full pay and allowances by a person in confinement. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1089–90 (1949). The legislative history, however, does not suggest any reasons for providing a different effective date for forfeitures in cases not involving confinement. *See* H.R. Rep. No. 49, *supra* at 27, S. Rep. No. 486, *supra* at 24.

Senator Exon. Why would DOD remove the existing requirement that no sentence which includes confinement for 1 year or more may be executed until affirmed by a Court of Military Review and, in appropriate cases, by the Supreme Court? How, if at all does this proposal relate to the changes made by the Military Justice Amendments of 1981?

Mr. Taft. The existing requirement has no practical effect. The accused may be confined as soon as the sentence is adjudged, Article 57, and there is no change under Article 71 in status when the sentence is ordered to be executed after completion of appellate review. Prior to enactment of the amendments to Article 13 in the Military Justice Amendments of 1981, a person awaiting appellate review could not be confined in the same manner as a person whose sentence was ordered executed. The 1981 amendments eliminated the distinction between the two types of post-trial prisoners.

CONTENT OF RECORD

Senator Exon. Do DOD or the TJAGs favor a system where an individual confined for one year would not be entitled to a complete (*i.e.*, verbatim) record of trial (or to appeal to the Court of Military Review) as S. 2521 would provide?

Mr. Taft. This aspect of S. 2521 is related to the expansion of the jurisdiction of special courts-martial to include confinement for a year. As noted in my statement, if such an increase is adopted, it should be accompanied by the protection afforded an accused when a bad-conduct discharge is adjudged by a court-martial, including preparation of a complete record.

REVIEW OF CASES NOT SUBJECT TO REVIEW BY A COURT OF MILITARY REVIEW

Senator Exon. How, if at all, do the provisions in S. 2521 and the DOD proposal alter the review now provided to cases not subject to appeal or review under Articles 66 and 69?

Mr. Taft. Current law simply requires that such cases be reviewed by a judge advocate and forwarded to the general court-martial convening authority, who may take the same types of action as are available to the initial convening authority (e.g., approve or disapprove the findings or sentence in whole or in part). Both S. 2521 and the administration proposal require legal review of all such cases under Article 64 by judge advocates, thereby codifying present practice. In addition, both bills preclude a judge advocate from conducting such a review if he has previously taken part in the same case. Each requires the judge advocate to determine whether the court had jurisdiction, and whether the sentence was lawful. The administration's bill requires the judge advocate's review to be in writing, and requires a response in writing to written allegations of error by the accused. Under our bill, the record of trial and a recommendation of the judge advocate will be forwarded to the general court-martial convening authority when the judge advocate recommends correcting action, when the sentence extends to dismissal, a punitive discharge, or confinement for one year or more, or when such action is required by service regulations. S. 2521 requires such action only when the judge advocate determines that corrective action is required by law. Both bills permit the general court-martial convening authority to take the following action on the judge advocate's recommendation: approve or disapprove the findings or sentence in whole or in part; taken clemency action; or order a rehearing except when the evidence is insufficient. Both bills require the case to be forwarded to The Judge Advocate General if the officer does not take action at least as favorable as that recommended by the judge advocate.

Senator EXON. What cases formerly subject to review under those Articles now will be subject to review only under the revised Article 64—review of a judge advocate under the DOD proposal? Under S. 2521?

Mr. TAFT. Under current law, the Courts of Military Review under Article 66 review all cases in which the sentence extends to death, a punitive discharge, dismissal, confinement for one year or more or that involves a flag or general officer. Under our bill, the Courts of Military Review will consider all cases in which the sentence extends to death, and all other cases in which the sentence involves a punitive discharge, dismissal or confinement for one year or more and there is no waiver of appeal. If there is a waiver of appeal in such noncapital cases, then they will be reviewed by a judge advocate under Article 64. S. 2521 is similar, except it requires canfinement for more than one year to invoke the jurisdiction of the Courts of Military Review.

Under current law, all general courts-martial not subject to consideration by a Court of Military Review are reviewed in the Office of The Judge Advocate General. Under both proposals, such direct review would be required unless there has been a waiver by the accused. In the event of such a waiver, such cases will be reviewed by a judge advocate under Article 64.

REVIEW OF CASES IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Senator EXON. Under the DOD proposal has the scope of the cases which will be or may be reviewed in the Office of The Judge Advocate General been expanded, shrunk or left as it was? Please explain.

Mr. TAFT. Under current law, all general courts-martial not within the jurisdiction of the Courts of Military Review are reviewed automatically in the Office of The Judge Advocate General. Under both bills, such review will not take place if waived by the accused.

Under current law, all courts-martial that have not been reviewed by a Court of Military Review are subject to review in the Office of The Judge Advocate General upon petition of the accused or on motion of The Judge Advocate General. Our bill does not make any changes in this regard. However, our bill permits The Judge Advocate General to modify or set aside the findings or sentence, and to order rehearings without referring the case to a Court of Military Review. It also permits him to review a case for sentence appropriateness.

CLEMENCY ACTION BY THE JUDGE ADVOCATE GENERAL

Senator EXON. Do DOD or the TJAGs oppose the clemency authority for The Judge Advocate General included in S. 2521 even if that authority is only recommendatory in nature?

Mr. TAFT. We do not favor section 3(bb) of S. 2521, which would amend Article 69 to provide for The Judge Advocate General to submit clemency recommendations to the Secretary concerned. When The Advocate General acts under Article 69, he is serving as an appellate authority. It would be inconsistent with that role to have him submit clemency recommendations to the Secretary in conjunction with such appellate review. Our bill permits The Judge Advocate General to change the sentence on the issue of appropriateness (thereby granting him the same power as is possessed by the Courts of Military Review) which obviates the need for this aspect of S. 2521.

SERVICE OF PROCESS

Senator EXON. Have the Military Services had difficulty in getting the Department of Justice (*i.e.*, U.S. Marshals) to serve process from courts-martial?

Mr. TAFT. We do not have any particular problem at this time. Several years ago we had some difficulties in this regard, but we were able to work out a satisfactory arrangement with the Marshals. When practicable, we serve process ourselves; when this is not practicable, we seek the assistance of the Marshals and they have provided it.

Senator EXON. Do any other Article I courts have specific statutory authority directing U.S. Marshals to serve their process? Or do they all rely on 28 U.S.C. § 569(b)?

Mr. TAFT. The District of Columbia Court of Appeals and the Superior Court may direct the U.S. Marshal to serve its process. D.C. Code Ann. § 13–302. The other Article I courts rely on 28 U.S.C. § 569(b).

PROVISIONS RELATED TO COMA RETIREMENT

Senator EXON. Should judges of the U.S. Court of Military Appeals be removable for mental or physical disability? If not, why not? Are judges of other Article I courts removable for such causes?

Mr. TAFT. Article 67 presently authorizes removal on the basis of mental or physical disability. Judges of other Article I courts are subject to involuntary retirement on these grounds. *See, e.g.*, 26 U.S.C. 7447(h)(2) (the Tax Court) and D.C. Code Ann. § 11–1526 (judges of the courts of the District of Columbia). We do not object to provision of retirement pay in appropriate circumstances.

EXPANSION OF CONFINEMENT POWERS OF SPECIAL COURTS-MARTIAL

Senator EXON. Mr. Taft, you note that referring cases to general courts-martial "only means a greater burden for the government, in terms of the requirement for an Article 32 pretrial investigation." But isn't the Article 32 investigation an important and fundamental protection for the accused, which will not be present to the extent more cases are referred to special courts-martial?

Mr. TAFT. The Article 32 investigation is an important aspect of military law, but it does not constitute a fundamental right of accused persons in criminal proceedings. Congress, for example, has determined that there is no need for an Article 32 investigation prior to a special court-martial, even though such courts can adjudge punishments extending to six months confinement and a bad-conduct discharge. In civilian life, there is no right to a pretrial investigation in which the accused is represented by counsel, has the right to discover evidence, and the right to examine witnesses. In the civilian sector, indictment by grand jury (which does not afford the accused the same rights as a military defendant under Article 32), is not required with respect to offenses in which the punishment is confinement for one year or less. *See* Fed. R. Crim. P. 7. Moreover, there is no constitutional right to grand jury indictment in state court proceedings no matter how serious the offense. *Hurtado* v. *California*, 110 U.S. 516 (1884). Under these circumstances, we believe that extending the jurisdiction of special courts-martial to include one year's confinement, the same term of confinement that constitutes a misdemeanor under federal civilian law, is reasonable.

Senator EXON. Mr. Taft, you advocate affording certain accused the same protections afforded an accused when a bad-conduct discharge is adjudged, including "preparation of a complete record." But under both bills, there no longer will be automatic preparation of a complete record in bad conduct discharge cases, isn't that correct? Are you advocating a revision to that proposal?

Mr. TAFT. Under our bill, and under S. 2521, a complete record will be prepared in every special court-martial in which a bad-conduct discharge is adjudged unless the accused waives the right to an appeal. In the event of such a waiver, a summarized record will be prepared. The Department is advocating that the same considerations apply when confinement is for more than six months.

Senator EXON. Is it not true that a bad-conduct discharge has generally been viewed as the equivalent of 6 months confinement?

Mr. TAFT. No. The Court of Military Appeals has noted that "[T]he variety of factors bearing on the relative severity of a punitive discharge and other punishments has tended to discourage the establishment of a fixed table of substitutions." *United States* v. *Darusin*, 20 C.M.A. 354, 43 C.M.R. 194, 196 (1971). The Court has held that a punitive discharge may not be substituted for 12 months confinement. This clearly implies that such a discharge is a more serious punishment than confinement for a year. *United States* v. *Johnson*, 12 C.M.A. 640, 31 C.M.R. 226 (1962). Moreover, the Air Force Court of Military Review has held that 12 months of confinement may be substituted for a bad-conduct discharge because a punitive discharge involves a more severe punishment than confinement. *United States* v. *Carrier*, 50 C.M.R. 135, 138 (AFCMR). *Cf. United States* v. *Kent*, 9 M.J. 836, 839 (AFCMR 1980). We see no reason why a special court-martial, which is empowered to adjudge the severe penalty of a punitive discharge, should not also be empowered to adjudge the less serious penalty of 12-months' confinement.

Senator EXON. In your testimony you cite various Air Force data, noting that in a number of cases sentences at or near existing maximum for special courts were imposed. What is the basis for your apparent conclusion that these courts might have imposed greater punishment if the jurisdiction of the special court-martial were expanded?

Mr. TAFT. Because the maximum punishment at this time is 6-months' confinement, a court may not impose a greater punishment even if it believes that such a punishment is appropriate for the offense. To the extent that courts adjudge sentences at or near the maximum punishment, the sentence may be influenced as much by the limitation as by the considerations of sentence appropriateness. In such circumstances, there is likely to be a significant number of cases in which the sentence is for 6-months' confinement even though the court believes, for example, that eight or nine months would be appropriate.

Senator EXON. Please provide for the record available statistics on what percentage of all courts-martial are general courts-martial. If available, compare this figure with the percentage 5 years ago and 2 years ago.

Mr. TAFT.

	Percent
Army:	
1981	18
1980	14
1979	17
1976	15
Navy:	
1982 (projected)	8.3
1980	3.3
1977	2.3
Air Force:	
1982[1]	21
1981	21
1980	17
1979	16
1978	12
1977	16
CY77–82 average	18

[1] As of July 28, 1982.

SELECTION OF MILITARY COUNSEL

Senator EXON. Mr. Taft, does the Department's proposal concerning the assignment of military counsel in any way alter an accused's existing rights to representation by individual or detailed military counsel? If so, in what way?

Mr. TAFT. No.

CORRECTION AND DISCHARGE REVIEW BOARDS

Senator EXON. What is the basis in the legislative history or otherwise for the Department's position that these Boards "do not have the power to alter the judgment of a court-martial?" Where? Is it the Department's position that these Boards cannot alter such a judgment even for reasons of clemency?

Mr. TAFT. Congress has provided expressly that the "[o]rders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments . . . of the United States. . . ." 10 U.S.C. § 876 (article 76). Although several courts have suggested that the Correction Boards may order a change in a military record that reflects the results of a trial by court-martial, *e.g.*, *Baxter* v. *Claytor*, 652 F.2d 181 (D.C. Cir. 1981); *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965), they do not have the power to invalidate or overrule the judgment of the court-martial. *See Baxter* v. *Claytor*, *supra*. It is the position of the Department of Defense that the Correction Boards cannot alter the judgment of a court-martial for purposes of clemency, although they can alter a military record resulting from a court-martial (*e.g.*, by changing a discharge) for purposes of clemency.

Senator EXON. Isn't there a substantial difference between the time frame for bringing cases before the Correction Boards and Discharge Review Boards which would warrant retaining the power of the latter to deal with court-martial discharges?

Mr. TAFT. This is not the case. With respect to the Army, the Board of Correction of Military Records estimates that it takes 146 days to complete an average case. The Discharge Review Board takes nine to twelve months to complete a case, but processing times vary widely depending on the mode of hearings and the status of the applicant's records. In the Navy, it takes an average of 8.2 months to complete a case before the Correction Board, and 6 months to complete a case before the Discharge Review Board. The Air Force Board for Correction of Military Records estimates that 85 percent of its cases in calendar years 1980 and 1981 were processed within 4 to 6 months. The Air Force Discharge Review Board reports that its average processing time for cases in calendar year 1981 was 7.5 months.

Senator EXON. DOD would appear to apply some of the changes in its proposal to cases already pending before the Correction Boards and Discharge Review Boards on the date of enactment? Why? Please explain.

Mr. TAFT. Our amendments would not affect the ability of the Discharge Review Boards or the Correction Boards to complete action on pending cases. However, our bill would limit their actions to matters of clemency or to correct a record to reflect actions taken by reviewing authorities under the UCMJ. In our view, this is the appropriate extent of their powers under current law, and the language in our bill with respect to pending cases would preclude any ambiguity as to the effect of the change on those cases.

CONFINEMENT POWERS OF SPECIAL COURTS-MARTIAL

Senator EXON. General Bruton, in your statement (p. 3) you indicate that you "suspect that many cases are referred for trial by general courts-martial—which have no punishment limitations like those of specials—because the limit on punishments by special courts-martial is too stringent." Do you have any data to support your suspicion? Do you believe that we ought to be doubling confinement authority of the special court-martial based on the suspicion outlined in your testimony? If so, why?

General BRUTON. The data you request is attached. It is the same data on which I relied in measuring the value of this proposal of S. 2521 before preparing the argument in favor of this proposal made in my statement, and it was relied upon in the detailed statement of the General Counsel.

This proposal appears to proceed from two premises. First, it proceeds from the premise that a special court-martial ought to have power to confine equal to that which may be exercised by a United States magistrate under 18 U.S.C. §§ 1(2) and 3401(b). Second, it appears to be an effort to improve the efficiency of the UCMJ by making a reasonable adjustment to the special court-martial that will give it authority over that part of the caseload now being referred to general courts-martial but not warranting sentences more severe than the amendment proposes.

ACTION BY THE CONVENING AUTHORITY

Senator EXON. General Clausen, in discussing the proposed revisions to Article 60 you note that "the convening authority retains authority to disapprove findings of guilty and to reduce or disapprove the sentence as a matter of clemency or command prerogative. Thus, the accused does not lose the benefit of possible favorable action at this level." As a practical matter, how meaningful does this right become when it is not based on legal determinations? Won't the convening authority basically be inclined just to let the case go to the Court of Military Review or the appropriate Judge Advocate General, especially since his authority to direct a rehearing would be limited?

General CLAUSEN. Under the proposed legislation eliminating convening authority's legal review and SJA review I would anticipate little change in the number of actions favorable to the accused by convening authorities. We do not maintain statistics on the number of times convening authorities take action favorable to an accused, or the reasons for such action. Experience indicates, however, that the vast majority of favorable actions taken at the convening authority level are pursuant to pretrial agreements. Convening authorities will continue to take these types of favorable actions even if there is not a legal review of the case. Most other favorable actions taken by convening authorities are for purely clemency purposes. There is no need for a legal review prior to taking a clemency action. The proposed legislation would not affect the number of favorable actions in this category either. In practice, the power to order rehearings is rarely exercised. A recent check of several major court-martial installations revealed only one rehearing in the past two years had been directed by convening authority as a result of his action on the case. The right to favorable action not based on a legal determination is extremely meaningful and will continue to be under the proposed legislation.

Senator EXON. Admiral Jenkins, you comment (p. 4) that under the proposed legislation the pretrial "advice from the staff judge advocate need only provide [the convening authority] with sufficient information to enable him to make the decision as to whether referral to trial is appropriate or not." Should the staff judge advocate be required to provide the basis for his conclusions about sufficiency of the specifications, the evidence and the jurisdiction of the court to the convening authority? If not, why not?

Admiral JENKINS. Under the current provisions, the convening authority must himself make the required legal determinations based on the advice of his staff judge advocate. He must, therefore, have before him the factors and bases for the judge advocate's conclusions and recommendations. The proposed legislation would not require the convening authority to make these legal determinations and, therefore, the bases for the staff judge advocate's conclusions about the sufficiency of the specifications, the evidence, and jurisdiction are not necessary to the convening authority's ultimate decision as to the appropriateness of a court-martial or the type of court-martial.

Mr. PRINCIPAL. The subcommittee will now proceed to other business. Thank you, gentlemen.

[Whereupon, at 11:15 a.m., the subcommittee proceeded to other business.]

THE MILITARY JUSTICE ACT OF 1982

THURSDAY, SEPTEMBER 16, 1982

U.S. SENATE,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met in open session at 9:38 a.m., in room 212, Russell Senate Office Building, Senator Roger W. Jepsen (chairman) presiding.

Present: Senator Jepsen.

Staff present: Anthony J. Principi, counsel; Paul C. Besozzi, minority counsel; and Kimberly A. Manning, staff assistant.

Also present: Jim Dykstra, assistant to Senator Cohen; Jon Etherton, assistant to Senator Jepsen; Julia Habel, assistant to Senator Byrd; Greg Pallas, assistant to Senator Exon; and Hank Steenstra, assistant to Senator Quayle.

OPENING STATEMENT BY SENATOR ROGER W. JEPSEN, CHAIRMAN

Senator JEPSEN. The Subcommittee on Manpower and Personnel convenes this morning to continue its deliberations on two important pieces of legislation, S. 2521, the Military Justice Act of 1982, and the Department of Defense proposal, the Military Justice Amendment of 1982.

I am pleased to welcome the judges of the Court of Military Appeals, Chief Judge Robinson Everett, Associate Judge William Cook, and Associate Judge Albert Fletcher; Mr. Ernest Fremont and Mr. Dore Hunter representing the American Bar Association; Mr. Eugene Fidell on behalf of the American Civil Liberties Union; Col. John Douglass, retired, of the Judge Advocates Association; and Mr. Steven Honigman representing the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York.

The Constitution places great responsibilities upon the Members of Congress to regulate our land and our naval forces.

As chairman of the Subcommittee on Manpower and Personnel I believe that it is essential for this committee to review periodically the military justice system to insure that it continues to evolve as a fair, efficient, and effective system. Discipline and justice are very, very important ingredients of a strong and a vibrant military force and, I might add, to society and the country in general.

As I stated in my opening remarks last week, I believe the basic structure of our criminal justice system is sound. Since the adoption of the code, a number of significant reforms designed to safeguard the rights of the accused have been made in the military justice system.

Today the services have a core of highly professional and qualified attorneys serving as judges and counsel at the trial review and appellate levels. They are to be commended for the service they perform.

In view of the many positive changes to the system, I question the necessity to continue certain practices as well as the basis for differences between the military and Federal, State, and criminal justice systems that are not based upon the unique needs of the military. counsel on this important subject. Each of you have identified signif-

Gentlemen, we have read your statements and we appreciate your icant issues and raised important questions. The members of this subcommittee, after obtaining the views of the Office of the Secretary of Defense and the Judge Advocates General will carefully consider them. After due deliberation, I shall make every effort to have necessary changes and new provisions enacted into law.

In the interest of time, I would respectfully request that you summarize your prepared text. Your written statement will be made an official part of the record as if read. In view of the number of witnesses, I shall limit also my questions and propose most of them for the record.

Judge Everett, you may proceed as you wish, and welcome.

STATEMENT OF HON. ROBINSON O. EVERETT, CHIEF JUDGE, COURT OF MILITARY APPEALS; ACCOMPANIED BY HON. WILLIAM H. COOK, ASSOCIATE JUDGE, COURT OF MILITARY APPEALS AND HON. ALBERT B. FLETCHER, JR., ASSOCIATE JUDGE, COURT OF MILITARY APPEALS

Judge Everett. Thank you, Mr. Chairman.

The other two judges of the court, Judge Cook and Judge Fletcher, and I join in expressing our appreciation for this opportunity to appear before the committee.

We also want to express our appreciation for the tremendous contribution that has been made under your leadership as evidenced in the 1981 amendments which have already had a significant impact on military justice and as evidenced by the hearings that were conducted last Thursday and are being conducted today.

I think it is very important that military justice be updated to meet new challenges. We have a good system. It seems to be working quite well, but certainly there is room for improvement in this as in any other system.

We have submitted the prepared statement which I think reflects the collective views to a considerable extent. Judge Cook and Judge Fletcher may note reservations or supplementary views at the end of my remarks.

What I am going to do in line with your earlier request and suggestion is just to summarize some of the points that are here in our statement and point perhaps to a couple of additional matters which have come to my attention as a result of reading the statements of some of the other witnesses and hearing the testimony.

JUDICIAL RETIREMENT

Now the matter of course which has the most immediate impact on our court is judicial retirement. As we have indicated and I think a number of the other witnesses have indicated, there is a need for a sound and equitable system of judicial retirement for our court.

As a means of trying to simplify the quest for such a system, we have proposed in the statement on page 3 a type of legislation that we think would be satisfactory certainly from our standpoint and we think would work well. It would authorize the Department of Defense to promulgate regulations pursuant to certain standards that would be designed to establish a satisfactory and fair judicial retirement system.

Judge Cook who is here and who is senior in service on our court is particularly familiar with the retirement issue and with various alternatives, the history of retirement in our court and in other courts and he can speak in detail with respect thereto if there are questions.

APPEALS BY THE GOVERNMENT

With respect to appeals by the Government, we certainly endorse in concept the proposal made in S. 2521. We see no reason why the Government should not have the opportunity to appeal from adverse decisions on certain matters in the trial courts just as it has in the Federal District Courts.

Judge Fletcher, who is an experienced trial judge, has particularly studied this proposal and can respond in detail to questions with respect thereto.

I might note, and this is a matter of fine tuning, that there are two or three aspects in which the Department of Defense administration proposal probably is preferable. For one we think that the review should not be cut off at the Court of Military Review level. Second, we think as a matter of simplicity it should be at the instance of the trial counsel rather than the convening authority.

We suggest in our statement possible wording which is in many State statutes, such as that in my native State of North Carolina, and also is in 18 U.S.C. 3731 which might tend to provide a safeguard against abuse of the appeal by the Government.

REHEARING EN BANC IN THE COURTS OF MILITARY REVIEW

We favor reconsideration en banc by courts of military review. This, by the way, is another proposal on which there seems to be little controversy. I might note that the American Bar Association has for many years taken a position that this is desirable and they have also taken the same position with respect to the two matters I have touched upon earlier.

The need for this particular provision, which would authorize Courts of Military Review to do that which is permitted in I think every Federal Court of Appeals, arises from the peculiar wording of the statute which was interpreted long ago in some decisions by our Court. Frankly, if it were an open matter at this time, who knows what the outcome would be, but we are bound by that precedent and we would request the Congress to change the statute.

VIDEOTAPED RECORDS OF TRIAL

Videotaped records of trials are another matter in which we think improvements could be made. Once again, because of the wording of the existing code, which requires a written record, one of our court decisions some years ago, which considered videotaped records prepared by the Coast Guard, ruled that it did not comply with the requirements of the Uniform Code.

We certainly think that new technology should be utilized, and with that in mind we would favor the videotaped record of trial in the first instance and the videotaped deposition. We would, however, have one caveat, and that is that for purposes of appellate review, either at our level or that of the Court of Military Review, it would be desirable and in fact we think, either in the legislative history or in the code itself, it should be made explicit that the videotaped record would be transscribed.

ORAL REQUESTS BY JUDGE ALONE

With respect to oral requests for trial by judge alone, we think this is a matter of housekeeping which is desirable. We would recommend, however, that since the written request practice is the norm today and is working quite well, that it continue to be the norm and that the provision of oral requests for trial by judge alone be used as a sort of safety valve in the unusual situation.

EXCUSES AND APPOINTMENT OF COURT-MARTIAL PERSONNEL

We favor the proposals for excuses and appointment of court-martial personnel, including military judges and the counsel. Now in one instance I think one of the proposals emanated from one of the members of our court during a code committee meeting, the code committee being the committee established under article 67(g) consisting of the three judges and of the Judge Advocates General. We think this is a method to simplify procedures without in any way sacrificing protections. Indeed, it would bring the word of the law in line with what is the actual practice at the present time.

SENTENCE LIMITATION WHERE GUILTY PLEA SET ASIDE

The administration has proposed the removal of a limitation on sentence in a situation where there has been a pretrial agreement and the sentence has been reduced by the convening authority as he acts on the case pursuant to the pretrial agreement. Now pretrial agreement is just another word for plea bargain.

This certainly makes sense. If the Government has not received the quid pro quo, it should not be bound by the plea bargain, that is the plea of guilty is not kept intact. On the other hand, we would suggest that both the administration and perhaps the committee look carefully at the existing language of the code to see whether or not a code amendment is necessary or whether instead the change, which is desirable, should be accommodated within a manual revision.

SIMPLIFICATION OF PRETRIAL ADVICE

With respect to pretrial advice under article 34 of the code preceding a trial by general courts-martial, we favor the simplification of the procedures and once again having the language, the letter of the law conform to the actual practice. Now currently the convening authority, a military commander, typically a layman, makes purportedly certain determinations of law. Obviously he relies very heavily on his Staff Judge Advocate, the trained lawyer who is assigned to him. With that in mind, we would suggest, as S. 2521 proposes, that the pretrial advice be in the name of the SJA himself, the Staff Judge Advocate. We of course believe that it should be in writing rather than oral.

Our philosophy on this is twofold. One, that it is cautionary. When you put something in writing, it is sort of a caution to you. You think about it a little bit more. Second, it is evidentiary. When it is writing, you know it is there. Now checklists are very commonplace in the military community as well as in business. Really by having written advice, all you are doing is saying here is a sort of checklist requirement, something that the Staff Judge Advocate has to do, has to think about and has to put in writing.

INCREASE IN PEREMPTORY CHALLENGES

Peremptory challenges are something as to which we would favor a change. We would favor an expansion, but at the same time we are conscious of the manpower implications. We think there is a relationship perhaps between the peremptory challenge provision, on the one hand, and, on the other, some of the proposals for sentencing by judge alone. This is not one of the proposals that we recommended for immediate adoption at the end of our statement because we recognize that there can be a valid difference of viewpoint on it.

The American Bar Association has favored the expansion of the peremptory challenge and certainly we, subject to any manpower limitations, favor the expansion of the peremptory challenge.

I think historically at one point general courts-martial consisted of 13 members back in the early days of the Republic. I don't know whether that provides a precedent for expanding the base to allow more peremptory challenges, but certainly there are some manpower implications.

SENTENCING BY MILITARY JUDGE ALONE

Now with respect to sentencing by a military judge alone, I was struck by a statistic that appeared in General Bruton's statement and Admiral Jenkin's statement. In the Air Force about half the cases, 51 percent, involve sentencing by a judge alone where the accused has opted for that particular route. In the Navy it is 87 percent, a rather startling diversity of practice.

I think in many of these instances, by the way, the statistics from the different services, if you get into them, prompt many interesting questions and some that hopefully they will be ventilating among themselves and discussing with the general counsel.

But in any event, with respect to sentencing by military judge alone, we note that in concept it seems desirable; that is, it conforms to the standards of criminal justice and judicial administration of the American Bar Association. There are some efficiencies that result.

But, on the other hand, Mr. Chairman, going back to your statement about conforming to the civilian model, unless there is some unique reason for following a different pattern where there are unique circumstances, we think this may be one of those circumstances where there are unique aspects of the military society which perhaps call for the retention of the existing practice.

Now, in that regard, we particularly have tried to point out implications of the proposal because we think they are far-reaching. The one thing—and of course we are very much in favor of legislative action to improve the code—but the one thing we want to avoid is a situation where a year or two in the future somebody will say, my goodness, we shot ourselves in the foot. We are afraid that there are some implications in this proposal which might be undesirable taking the present situation in comparison to what might evolve.

One aspect of this that is worthy of note is that under the present system by opting for a trial by court members with enlisted members, the accused, if is he an enlisted member, can be sentenced by a panel which includes enlisted members. Now that is something which perhaps creates some confidence in the system.

One thing that surprised me, by the way, and I have gone out to many military commands and whenever I do I talk to commanders, military judges, SJA's, and others, is the tremendous diversity in practice at different installations with respect to use of sentencing by a military judge alone and also with respect to the use of the election of enlisted members.

When I was a defense counsel and trial counsel many years ago in the Air Force, the use of the enlisted member was almost unknown. Now I have gone to some posts, I believe primarily Army, where in every case where they have a trial by court members they ask for enlisted members, and the availability of the enlisted option is a factor that should be taken into account which we did not specifically call attention to in our statement.

The primary thing that concerned us in terms of implications to be considered, and you can go either way and I think there are arguments each way, is that if you take the sentencing responsibilities away from the court members then you certainly have reduced the arguments for the present system of appointment of court members. There are standards set forth in article 25 of the code which call for the selection of court members in terms of maturity, experience, and similar criteria.

I think one justification for those standards is that it is very important to have experienced court members, senior court members because of their role in sentencing. If you take away that role, then the justification for the present system of court member selection is undercut.

It was interesting to me, I did have an opportunity to examine the proposal of the New York Bar as contained in the statement by Mr. Honigman, and they are moving forward on that very implication and are suggesting a change in the system of selection of court members.

COMPARISON WITH CIVILIAN COURTS

Senator **Jepsen**. Excuse me, Judge Everett, why do you think, considering the rightness or the wrongness, in other words this is a judgmental question, but why do you think that Federal and most State courts have adopted the practice of sentencing by judges alone?

Judge **Everett**. I think they have adopted it because of some efficiencies that exist in the civilian society. They have a different tradition than the military. The military has a different type of juror, if I may use that term, than is true in the civilian society. In the civilian society you do not have typically a situation where a judge comes in from a long distance and is unfamiliar with the local conditions.

For example, when I was over in Europe this summer I found that the Air Force judges from Rhine Mein up in Germany would go down to Helicon in Athens to try a case. Now they are not going to be that familiar with conditions in Athens which might be relevant to the type of punishment that should be imposed in a particular case. The people who are on the court appointed from that area may be very familiar therewith.

Second, the civilian society is not a hierarchial system like the military. You do not have an officer/enlisted distinction and therefore the right of having an enlisted court can be very significant.

Third, there seems to be developing a greater practice of cross-utilization of legal personnel. I know, for example, in Hawaii there are many Air Force general courts and special courts, particularly general courts, which are being tried by Army military judges. They do that instead of bringing in an Air Force military judge out from the mainland at a cost of several hundred dollars.

I believe, and I think all the members of the court believe that interservice use of personnel is cost effective. But, on the other hand, if I were an airman getting ready to be sentenced and were going to be sentenced by an Army military judge, I might have some hesitation because I would feel that he was not that familiar with the conditions in my service. So I think that one of the other aspects of the sentencing by judge alone is that it may run against the grain of cross-utilization of military judges.

Those are the reasons why I think there may be some peculiarities of the military system which differentiate it from the civilian model. On the other hand, there are many similarities and certainly there can be some efficiencies to be gained by making a change. It is quicker, you don't have to go through the instructional process and hopefully it is more predictable.

Now for some reason in the discussions I have had with people out in the field it appears that the perception is that the military judges will be tougher than the present court members. This is true across the board. That sort of disturbs me because if the military judges across the board are going to be predictably tougher than line officers and staff officers who are selected from the particular command involved, which presumably is going to be especially concerned with disciplinary conditions, there is something a little haywire there and I haven't figured that out. But I certainly would recommend that if this proposal is adopted that it not be used as a means of hammering the service member, and I have heard this espoused out in the field as a sort of justification.

Senator JEPSEN. I would like to explore that a minute, if I might, Judge Everett, if I may interrupt. This philosophy that jury sentencing should continue in order to exert pressure on military judges to award more lenient sentences and hence encouraging judges-only trials and shortening the dockets. Now if this is true, would you say there is a question about whether this is a reasonable system of justice or whether it is one designed to get the accused off?

Judge EVERETT. Mr. Chairman, if that is the case, then I would say that is an abuse under present circumstances. If the trial by military juror and the sentencing is used as a means of providing something that will force the military judges to give lighter sentences, that also would bother me.

VARIATION IN SENTENCES

Senator JEPSEN. Based on your experience, are juries more prone to award widely divergent sentences to service members convicted of very similar crimes under very similar circumstances and with similar personal backgrounds?

Judge EVERETT. Mr. Chairman, I would hate to try to answer that. I will put it this way. A particular military judge can be pretty predictable. As between different military judges I am not sure there is that much consistency. I am reminded of a survey that was reported in the newspapers recently involving a hypothetical question of Federal judges as to what sort of sentence they would impose in a particular instance and the variation was very dramatic.

Now it is hard for me sitting here in Washington to know to what extent variations in sentence in a particular case are due to the particular circumstances in a local command, and, to be perfectly honest, I have seen some variation among sentences by judges alone and sentences by courts members that I won't say have shocked me, but have surprised me. So I am not sure it has got to be that consistent no matter which way it is done. I would hope that it would be much more consistent.

Senator JEPSEN. As a lay person trying to constructively analyze and understand this, I realize that to some extent sentencing by judges or juries is going to be unpredictable. However, civilians accused have the right to be tried as to guilt or innocence by a jury and then to be sentenced by a judge alone. This right affords them the constitutional protections inherent in jury trials, that is, the burden of the prosecution and the maturity, experience, and perspective of the judge to decide an appropriate sentence, and there is some question of why shouldn't the accused in the military community have the benefit of such practice.

It seems to me that a judge who sits and views case after case has similar ones grouped together, whereas each time you have a jury, and on any particular jury at any particular time you have got a whole new bunch of people and a whole new group of people looking on. I don't know, but those of us who have not had formal legal training look at logic and things as they are and sometimes find it difficult to understand why consistency of justice is probably one of the keys to the overall respect for the system, if there is such a thing. I don't know, is there such a thing as consistency in justice?

Mr. PRINCIPI. Absolutely.

Judge **Everett**. Mr. Chairman, I think certainly consistency and predictability are desirable. I think they are very important. At the same time, let me mention one point that I think deserves consideration. You of course have had an extensive military background and you certainly are aware of the differences in so many respects between the military society and the civilian society. There is no punishment for quitting a job in civilian life. In the military if you do so you can be prosecuted for desertion and put in jail for a long time. So there may be some differences that call for a difference in this regard as to the sentencing.

I should note that to some extent the House of Delegates of the American Bar Association share your view because in 1974 they suggested that there be created a system which would move toward the civilian model where the accused could have the right to have a jury trial without having to have the sentencing by the jury. They were introducing that as an alternative. At the same time in that instance they refused to go the whole way to all-judge sentencing because they felt this was a traditional right of the service member that should not be changed.

Senator **Jepsen**. Along these lines I repeatedly hear of the importance of maintaining this military community, as you have just alluded to, which has different involvement in the sentencing. I would ask you as chief judge of our highest military court, are there not any other means for the military commander to make his views of sentencing known to the court other than by jury sentencing or command influence on its members?

Judge **Everett**. I would certainly think there are. Of course, to some extent he has a means of making his views known indirectly by the choice of members of the court under the present arrangement. Without any command influence he can certainly select people who he thinks are mature and experienced to serve on courts. I think a base or a post that has a good program of public awareness certainly can alert the members of the command to particular problems and hopefully they will respond thereto with appropriate sentences. So I am not saying this is the only way it could be done.

I might emphasize, Mr. Chairman, that we are not taking a position as a court for our against the sentencing by judge alone. What we try to do is outline the problems associated with it and the implications. Now the Congress might very well decide to go the whole way and really put the system in the civilian mold and change the jury selection, broaden the base, and have the whole thing very much like a civilian court.

If the Congress chooses to do so, we of course in interpreting the law will seek to apply that congressional intent. But it should be recognized that it is a far-reaching change with a lot of implications. Our hope is that it will certainly be considered in great depth before the decision is made one way or the other.

SUSPENSION OF SENTENCE BY JUDGE

Now certainly, Mr. Chairman, if you give the sentencing power to the judges, and indeed perhaps if you don't, the military judge should have the suspension authority. This is a proposal in S. 2521, and we can't see why if the judge is good enough to be given all sentencing power that he wouldn't be equally good for purposes of suspension.

I might note that typically or in many instances when the accused is sentenced he leaves the command. He is sent to Fort Riley or Lowry or somewhere else to serve his sentence. So he is not a continuing problem for the particular commander who is dealing with him and who is acting on the case. So I don't think that allowing the military judge to have a suspension authority is a reduction of the power of the convening authority. I don't think there is any inconsistency in that regard.

We do believe, particularly if the military judge is to be given the broad sentencing power that is contemplated in S. 2521, that he should also have the suspension power just as civilian judges do in almost every court in the land.

POST-TRIAL REVIEW BY CONVENING AUTHORITY

Now with respect to post-trial review, the review by the convening authority, we have made some rather technical points in our discussion and our statement. The change in the code that is contemplated both by S. 2521 and by the administration would substitute a written recommendation for a written opinion. How much savings or change will result from that will I suppose depend on the guidelines that are later promulgated for what goes into the written recommendation.

One thing we believe should be considered very carefully, and I am sure the committee will consider it, is the extent to which the information has to be compiled at some point for a variety of purposes, including appellate review, correctional classification, parole and clemency, and if it has to be compiled at some point, are there advantages in the present system whereunder the Staff Judge Advocate has that responsibility immediately after the trial?

I have heard a variety of views as to what will be gained and lost by eliminating the present requirement for the Staff Judge Advocate review. I think it is very cumbersome and unwieldy in its present form and provisions of the manual and some of the judicial interpretations are partly responsible for that. Certainly it should be streamlined. But whther the change in concept that is proposed here is desirable, I think there are arguments on both sides.

For one thing, by the way, it once again purports to change the role of the convening authority, and the convening authority, the military commander, has traditionally played an important role in military justice. He has put his approval on the findings and sentence or perhaps changed them and put a limited approval on them. Under current proposals he still will be exercising clemency power. He will have broad discretion. In a sense he could do the same thing, but the framework within which he is doing it will be changed.

Now certainly there will be some benefits from the standpoint of Staff Judge Advocates and their staff. They will save some time. Whether that savings in time is going to be outbalanced by a cost in time for somebody else is something that, in our view at least, needs to be thoroughly considered.

WAIVER OF APPELLATE REVIEW

Now with respect to the appellate process, we completely agree with the concept that underlies both S. 2521 and the administration proposal, namely, that there should be no automatic appellate review in the present form, that is through the Court of Military Review and our court, for an accused who doesn't want to have his case reviewed.

I have heard some of the Navy people, for example, refer to what they would call BCD strikers. BCD is bad conduct discharge and basically these are people who want out and they are ready to go out on any terms. Frankly, my feeling and I think that of Judge Cook and Judge Fletcher is that if they want out and have had their rights explained to them and they want to waive the appellate rights, then they should be accommodated and out they go subject to the service of any confinement that has been adjudged by a court. There is no point in going through a futile paternalistic exercise for someone who doesn't want to be protected.

At the same time, however, we suggest to you that you might wish to modify the proposal in S. 2521 to require a written waiver of appeal rather than to have a loss of appellate rights by inaction. I have talked to a lot of people out in the field who are familiar with the way the system operates and there seems to be a broad, and I won't say a consensus of view, but there are a lot of people who feel that the notice of appeal requirement is simply going to introduce additional paperwork.

General Clausen the other day in his statement spoke of a blizzard of paperwork and this requirement would introduce even more paperwork. We would suggest that instead of that there be some type of document of waiver or withdrawal of appeal which would reflect that the accused had been counseled and which would be signed by him. We might also note that, as we have suggested in the statement, there should be other provisions for waiver on his part. For example, he should be able to waive the right for a complete verbatim record or something of that sort.

PREPARATION OF RECORD BEFORE ACTION BY CONVENING AUTHORITY

Incidentally, speaking of the record of trial, we certainly would recommend that the time frame for the action by the convening authority be modified in such a way as to assure that the record of trial would be prepared before he acted. Now because of logistical problems sometimes the preparation of records of trial is delayed. There is a case we had the other day, 150-page record as I recall, it took them 200 days to authenticate it. So that the 40 days that is proposed here does not give enough leeway.

If the record of trial is going to have to be prepared for appellate review anyway by the Court of Military Review, our suggestion would be that the final action by the convening authority take place after the record of trial has been prepared and authenticated. There are other advantages in that. For one thing, the convening authority can catch any errors at that stage and we would suggest that this authority be increased to include the ordering of a rehearing as a matter of discretion.

But we do believe that since you have to prepare the record of trial anyway, there is nothing to be gained by having the convening authority act before the record of trial has been prepared, subject of course to the right of the accused to waive the record of trial or to waive his appellate rights, in which event you could move ahead, and indeed I am probably a little extreme in this, but my feeling would be that if the accused has been sentenced to a discharge and wants out, he can waive his rights and, subject to the service of any confinement, be put on the streets immediately.

EXPLANATION TO ACCUSED OF HIS APPELLATE RIGHTS

Mr. PRINCIPI. Judge, rather than having a statutory requirement for a written waiver, how would you feel about the possibility of requiring the military judge to not only notify the accused of his requirement to appeal but also to explain on the record his rights to appeal rather than require a written waiver, which might be tantamount to having every accused, whether he wants to appeal or not, in fact appeal?

Judge EVERETT. Well, it seems to me, and I know that the provisions of S. 2521 do contain a provision for the explanation of appellate rights, it seems to me there may be some advantages in having that explanation, although frankly that is just another chore of the military judge to undertake. It is very difficult immediately after a trial to decide whether or not you want to appeal.

To me it would seem advantageous to go through the procedure where you have something that documents that the accused has had his rights explained by his lawyer. The explanation in open court at a time when he frequently is stunned by the sentence he has received may or may not be very meaningful. Frankly, I don't think there would be any hesitation on the part of people who want to waive their appellate rights in signing a document which so indicates. So that I think the cases that are of great concern where there is an appeal for a person who doesn't want to appeal can readily be accommodated. Hopefully his attorney will be able to explain to him the rights and let him make a choice.

I am a great believer in letting a person talk to his attorney and get the attorney's advice, and if he has gotten that advice and makes a choice, then he is bound by it. I find that is more effective than putting the burden on the military judge. Ultimately it is going to have to go back to the defense counsel anyway. But these are suggestions and we just feel that in the longrun you will get the same result by requiring the waiver and you will have less possibility of error, delay, claims of ineffective counsel, and that type of thing.

INCREASE IN JURISDICTION OF SPECIAL COURTS-MARTIAL

Now with respect to the increase in the jurisdiction of the special courts-martial, I believe it was General Bruton who points out that this is a change in a jurisdiction that I think in the Army has existed since 1913. There are some good reasons for adopting such a change in terms of avoiding some of the paperwork for the general courts-martial, the pretrial investigation, and the pretrial advice under article 34. At the same time it has to be recognized that some safeguards are being eliminated.

I notice the statistics presented by General Bruton and Admiral Jenkins. In the Navy apparently 35 percent of the cases that were tried by general courts-martial resulted in a sentence that could have been adjudged by a special courts-martial if the jurisdiction of the special court were expanded. In the Air Force I think the statistic was around 54 percent.

Now, frankly, I think you need to go further with those statistics and ask how many of that 35 percent could also have been handled by special courts-martial under its existing jurisdiction. I don't know whether that 35 percent represents the increment that would be caught by this increase. I don't think that is the case.

I should emphasize also that in dealing with these statistics you have to have a qualitative as well as a quantitative judgment because frequently a very serious charge will be reduced by the jury. They will come in with a finding of ample assault instead of aggravated assault and the punishment will be much less or there will be extenuation and mitigation information that was not available to the convening authority. So that I am not sure that the statistics really mean that you will reduce the number of general courts-martial that much if the change is made.

I would call to your attention, and I don't think this was in our statement, that as article 19 currently reads with respect to the jurisdiction of special courts, there are certain provisions such as the provision for a military judge, a verbatim record and counsel which apply only in connection with the adjudging of a BCD. It seems certainly arguable, and I believe the New York Bar or one of the other witnesses will be making this point, that some of the protections that apply to the BCD case should be applicable if the special court is to be authorized to impose more than a 6-month sentence. The administration proposal partly contemplates that by requiring appellate review by the CMR, the Court of Military Review, in the situation where punishment I think of 6 months or certainly in excess of 6 months is imposed.

EFFECTS OF A BAD-CONDUCT DISCHARGE

Senator **Jepsen**. Judge Everett, you have a statement in your remarks where you indicate that the bad-conduct discharge equates to 6 months confinement at hard labor. Again as a layperson I don't understand. What is the genesis for that calculation?

Judge **Everett**. Well, that is a statement that has been made in a number of our opinions and it goes back really 20 or 30 years. To be perfectly frank, societal attitudes toward a bad-conduct discharge made during the Vietnam period have changed to the extent that the BCD, or the dishonorable discharge for that matter, did not carry the stigma that it did previously. I think now societal attitudes are changing again in the other direction as we move away from the trauma of Vietnam.

Basically the idea was this, that in terms of the after effects of a bad-conduct discharge—the stigma in the community that here is a man who hasn't performed his obligation to the armed services and the stigma on the part of employers—that these effects were equivalent to and indeed exceeded those that were incurred by 6 months in confinement.

I think Judge Quinn made that statement on several occasions. Back in 1962, when I was serving as a special counsel for Senator Ervin when his Subcommittee on Constitutional Rights considered some of the proposals that resulted in the 1968 Military Justice Act, I remember various witnesses were talking about the effects of the bad-conduct discharge and the stigma that was attached. I think that was the underlying genesis of this, that a person who has pride, who takes pride in doing his patriotic duty and serving his country is going to suffer quite a bit if he receives a bad-conduct discharge.

I would think, incidentally, in the present employment market that most employers would take into account the unreliability of a person who had received a bad conduct discharge. So that is the genesis of the statement. There are various cases in which we have made that statement, for example, in *United States* v. *Smith*, 9 Military Justice Reporter 359, page 360, in a footnote, there are collected citations on that very point. So it is something based not only on the precedent of our court, but based on the observations of a lot of people.

Frankly, I hope that a bad-conduct discharge does have some significance today and that we do have that attitude of patriotism in our country that the person who doesn't perform his enlistment obligation is viewed as someone who has not really lived up to a required standard.

DRUG OFFENSES

Mr. Chairman, I certainly want to, and my two brothers on the court share this feeling, we want to applaud you for the effort to deal with the drug problem. I suppose one out of three of the cases that we handle have some drug relationship.

I was at an airbase back in June and, as I recall, the Staff Judge Advocate there said that out of 35 cases they had had in the first part of 1982 that 30 had a drug relationship. Now that was unusual and admittedly I think they had a big drug bust. But, nevertheless, drugs are a tremendous problem. We tried to respond to that by our Trottier [*United States* v. *Trottier*, 9 M.J. 584 (C.M.A. 1980)] case, Middleton [*United States* v. *Middleton*, 10 M.J. 123 (C.M.A. 1981)] case and various other cases which are designed to recognize that problem.

We think that it is very appropriate that action be taken. Indeed, in a recent opinion we suggested that action be taken to modify the Manual for Courts-Martial or the Uniform Code to deal more explicitly with the drug problem and to take account of the fact that in 1970 Congress adopted a Controlled Substances Act which made a major change.

Now the Manual for Courts-Martial is undergoing a revision and as part of that revision they have looked into drug offenses and indeed there is an Executive order which I understand will be implemented in 2 weeks which will deal very specifically with drug offenses and it is very carefully considered.

We would suggest, Mr. Chairman, that if the committee determines to recommend a punitive article that it might be simplified in a way that would leave some of the traditional prerogatives to the President, but at the same time would evidence the congressional concern with this national menace and this menace to the military community.

With that in mind we suggested some terms that we thought might accommodate the problem. and that is in my statement on page 23. It is abbreviated but could be supplemented by the Executive order and otherwise. We do feel that care is necessary in dealing with this problem because, once again, by indirection there may be some side effects that were not intended.

For example, if you adopt this article, do you preempt the power of military commanders under article 92 to deal with drug paraphernalia? There are some things of that sort which should be made explicit in the legislative history or otherwise. Also, if the committee concludes that the Executive order awaiting implementation is desirable, perhaps you would wish to include that in your legislative history.

SUPREME COURT REVIEW BY WRIT OF CERTIORARI

With respect to certiorari, this is the proposal of the administration that impacts most directly on our court. I will not try to recapitulate the arguments pro and con. It is clear that the system being proposed is quite different than that which now applies to the Supreme Court vis-a-vis civilian cases and in that connection I will cite to the committee *Ross* v. *Moffett* which the Supreme Court itself decided in 417 U.S. 600.

I might also say that, contrary to the statement I believe by one of the witnesses, the absence of Supreme Court review does not mean that the service member is a second-class citizen. He is able to get to the Supreme Court in most instances today through collateral attack and, second, unlike civilians, the service member has appellate rights which, so far as I know, are completely unequaled in any civilian society—review of facts and review of sentence appropriateness for which there is no parallel. So I don't think that you need to adopt this simply to remove some supposed guilt feelings because the service member is a second-class citizen. I don't think that applies at all.

The real question you have to decide, it seems to me, is in terms of cost-benefit analysis, what will be gained and what will be lost, and in terms of the unique and distinct history of military justice whether this is something that requires review at this time by the Supreme Court on writ of certiorari. There are some technical aspects of the administration proposal which we comment upon and I think probably which you would want to examine with great care.

DISCHARGE REVIEW BOARDS AND CORRECTION BOARDS

With respect to discharge review boards and correction boards, two comments to supplement what is in our statement. First with respect to the correction boards, to some extent the proposal is a reaction to the decision of the U.S. Court of Appeals for the District of Columbia in *Baxter* v. *Claytor*, 652 E. 2d 181, (D.C. Cir. 1981). I believe it was last Thursday that a question was addressed to Admiral Jenkins about whether an appeal had been considered from that case.

I had occasion about that time to talk to the Acting Solicitor General. My understanding is that the reason it wasn't appealed was that to justify invoking certiorari, going for certiorari, meant accepting the worst possible interpretation of that case. In my view, it is a rather confusing opinion as to what the implications are. I think that is why it wasn't appealed.

We certainly concur with the recommendations implicit in S. 2521 and in the administration proposed that a group of laymen sitting as a correction board or as a discharge review board should not be allowed to overrule determinations of law made within the military appellate system. As to the discharge review boards, we suggest very strongly you might want to contact veterans groups which have been particularly active in representing applicants before these boards and perhaps getting statistics.

NEED FOR UNIFORMITY

Mr. Chairman, the other matters in the statement as to other areas of study I think speak for themselves. We believe, as General Bruton stated the other day, that there should be a Uniform Code. It is particularly desirable where you have joint task forces and joint commands. We would suggest that if differentiations are to be made, they be made on functional grounds as, for example, is currently the case with article 15 which speaks of people attached to or embarked in a vessel. We think that is really the best way to proceed rather than having different rules for different services.

ALTERNATIVE FOR POSSIBLE IMMEDIATE LEGISLATIVE ACTION

We have summarized in our conclusion, nine areas, and there are certain miscellaneous proposals which we thought were sufficiently noncontroversial and so subject to a consensus that perhaps they could be immediately acted on, hopefully even at this session.

We recognize that there is a basic choice to be made between nibbling away bit-by-bit and sort of going for broke and tying it all up in one package. Frankly, the committee has been very successful in the nibbles, the bites it has taken so far.

The changes that were made in 1979 and 1981 have been very significant and frankly we are happy that they were not deferred to a more general consideration. We recognize that there are choices each way, and we simply tried to outline those which we thought might be the most susceptible to immediate action.

With that, Mr. Chairman, I close my statement.

Judge Cook or Judge Fletcher may have some reservations or some additions with respect thereto.

Senator **JEPSEN**. Judge Cook?

Judge **COOK**. Well, I concur with the statement made by Judge Everett because it represents the position of the court.

Senator **JEPSEN**. Judge Fletcher?

Judge **FLETCHER**. Well, I, too, concur. I echo Judge Everett's opening remarks that we are pleased that your committee, sir, and you as the chairman have taken a particular interest in moving for change which you find necessary and which we find necessary.

[The prepared statement of Chief Judge Robinson O. Everett follows:]

PREPARED STATEMENT BY CHIEF JUDGE ROBINSON O. EVERETT, UNITED STATES COURT OF MILITARY APPEALS

Mr. Chairman and members of the Senate Committee on the Armed Services. I wish to express our Court's appreciation for the opportunity to appear before you. We are very pleased that you are giving attention to possible improvements in the Uniform Code of Military Justice. Although we think that at the present time military justice is functioning quite well, certainly improvement is possible. Indeed, the Amendments made to the Uniform Code in 1979 and 1981 have already produced substantial gains in efficiency without jeopardizing fairness. We also are happy that, after adoption of new Military Rules of Evidence in 2981 and streamlining of sentencing proceedings in 1981, a major revision of the Manual for Courts-Martial now is well underway and will probably be completed next year by the Department of Defense.

Until recently, military justice occasionally has suffered from failure to give prompt consideration to possible needs for statutory amendment or Manual revision. For example, after Congress enacted the Controlled Substances Act of 1970, no corresponding changes were made in the Uniform Code or in the

Manual for Courts-Martial in order to deal more effectively with the drug problem. See United States v. Ettleson, 13 M.J. 348 (C.M.A. 1982). When Federal legislation concerning testimonial immunity for witnesses was enacted in 1970, 18 U.S.C. § 6001-6005, no specific attention was given to the handling of immunity in military law. See United States v. Martin, 13 M.J. 66 (C.M.A. 1982); United States v. Villines, 13 M.J. 46 (C.M.A. 1982). Thus, we applaud this Committee and the Department of Defense for coming to grips with important problems in military justice and for seeking to simplify military criminal law administration. Moreover, we are pleased that machinery is now in place to assure that when the Congress makes major changes in the field of criminal law and procedure -- perhaps as to the insanity defense or capital punishment -- prompt consideration will be given to the desirability of corresponding changes in military justice.

With respect to the specific proposals now before you, we note that in many respects, S.2521 introduced by Senator Jepsen, parallels the legislation now proposed by the Administration. On many points, our Court is in full accord with the proposals -- or, at least, with their underlying concepts. In other instances, we believe the proposed changes need further study or revision.

Judicial Retirement

Of all the changes being considered by the Committee, our Court would be most directly affected by the provisions of S. 2521, which would establish for our Judges an equitable judicial retirement system. Currently the members of our Court are subject to the regular Civil Service retirement system; and we believe that the change proposed by Senator Jepsen would broaden the pool of qualified persons who, as a practical matter, would be available for future service on the Court of Military Appeals and also it would increase the continuity of membership on our Court. For example, in the past decade two Judges have left our bench to serve on Federal District Courts, where they would qualify for the judicial retirement available to Article III Federal judges. With this experience in mind, the American Bar Association recommended in 1979 the enactment of retirement legislation for our Judges like that proposed by Senator Jepsen; and we consider that such action would be highly desirable for our Court as an institution.

To reduce the length of the retirement provisions of S.2521 and at the same time provide a simple means for implementation, we believe the following language would suffice if inserted after the fifth sentence of Article 67(a)(1).

> Each judge is entitled to retirement pay and survivors annuities under regulations of the Secretary of Defense, which shall be based on the rules governing retirement pay and survivors annuities that are, and from time to time may be applicable to the Judges of the United States Tax Court, insofar as practicable and not contrary to or inconsistent with this chapter, and which regulations shall provide for transitional purposes that any person who is serving as a Judge of the United States Court of Military Appeals on the date of enactment of this Act, shall be eligible to receive retirement pay under conditions like those applicable to the United States Tax Court under Section 7447(b) of the Internal Revenue Code of 1954 (26 U.S.C. § 7447(b), as modified by the substitution of "ten years or more" for "fifteen years or more" wherever the latter phrase appears in Section 7447(b).

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This amendment to Article 67(a)(1) would establish for the Court of Military Appeals a retirement program available to the Article I court which is most similar to it in status and structure and provides for transition to the new system. Since the Department of Defense currently provides administrative support for the Court of Military Appeals, it can appropriately be assigned the task of establishing and administering the retirement program. Of course, should a statutory change be made as to the location of the Court of Military Appeals "for administrative purposes" see 10 U.S.C. § 867(a)(1), conforming changes can be made in the administration of the judicial retirement program. Judge Cook, who is present today and who is senior in service on our Court, can discuss with you any specific questions you may have concerning the need for an equitable retirement system for our Court.

Appeals by the Government

The American Bar Association has also recommended that government appeals from courts-martial be authorized in a manner similar to that available in criminal trials in the Federal District Courts. See 28 U.S.C. § 3731. We favor the concept, for we perceive no valid reason why in courts-martial the United States should be denied this remedy, which is allowed in other Federal criminal trials. While both S.2521 and the Administration would authorize government appeals, they differ in some respects. In that connection, we note our agreement with the Administration that: (a) there should be no requirement that the convening authority "direct" that the United States appeal; (b) there should be no limitation on our Court's power to review directly the decision of the Court of Military Review in connection with such an appeal; and (c) the current provision in Article 62(a) concerning return of the record to the court-martial for reconsideration at the instance of the convening authority should be deleted. Furthermore, to avoid abuses, there might be included in the Code or in the Manual for Courts-Martial some provision like that in North Carolina General Statutes 15A-979(c), which allows appeals of orders granting motions to suppress "upon certification by the prosecutor to the judge who granted the motions that the appeal is not taken for the purpose of delay and that the evidence is essential to the case". See State v. McDonald, 55 N.C. App. 393, 285 SE2d 282 (1982). Judge Fletcher, who is here today, can discuss in more detail the proposed procedure for government appeals in trials by court-martial.

Reconsideration En Banc by Courts of Military Review

Both S.2521 and the Administration would authorize Courts of Military Review to consider en banc the decisions of their panels. This change, which also has been recommended by the American Bar Association, is desirable, since it would assure greater consistency in the opinions rendered by each Court of Military Review and, in some instances, would obviate the need to seek review from our Court.

Videotaped Records of Trial

S.2521 and the Administration -- with the support of the American Bar Association -- propose that legislative authorization be granted for videotaping court proceedings and using the videotapes as a record of trial. We favor this proposal, subject to the caveat that it be made perfectly clear that appellate courts could require, by Court rule or otherwise, that the videotape be transcribed as a written record for purposes of appellate review.

Oral Requests for Trial by Judge Alone

We have no quarrel with the change proposed by S.2521 and by the Administration to allow a request for trial by judge alone to be made "orally on the record." However, since the present system seems to be working well, we would suggest that written requests continue to be the norm.

Excuses and Appointment of Court-Martial Personnel

We agree in concept with the Administration proposal to amend Articles 25, 26, 27, 29, and 38 of the Code to allow greater flexibility in the granting of excuses from court service and in appointing military judges, trial counsel, and defense counsel. However, under the Amendment to Article 38(b)(6)(B) proposed by the Administration, the convening authority would make determinations about "associate defense counsel" even though Article 27(a), as amended, provides that he no longer will be involved in appointing defense counsel in the first instance. For consistency, it would be more desirable to provide that the determinations as to "associate defense counsel" be made under secretarial regulations.

Sentence Limitations After Setting Aside of Guilty Plea

We concur with the Administration's view, as embodied in their proposed amendment to Article 63(b) of the Code, that an accused should not receive the benefit of a pretrial agreement if his plea of guilty is set aside during appellate review and a rehearing is directed. The Manual for Courts-Martial, rather than the Uniform Code itself, now contains the express restriction which the proposed amendment seeks to delete.

Pretrial Advice

As both S.2521 and the Administration propose, Article 34 should be amended with respect to the pretrial advice in referring cases to general courts-martial. However, we agree with the Administration that a written, rather than an oral, pretrial opinion should be rendered by the staff judge advocate. In the Armed Services and elsewhere, written checklists are a means for assuring that some action has been taken; and reliance on written opinions and recommendations serves a similar purpose.

Peremptory Challenges

S.2521 would increase the number of peremptory challenges available in a trial by court-martial. The American Bar Association has made a somewhat similar recommendation; and the members of our Court see advantages to such a proposal. Indeed, if it were adopted, we might have fewer appeals to consider with respect to denials of challenges for cause. However, we recognize that an increase in the number of peremptory challenges would induce convening authorities to appoint larger panels for service as court-martial members; and this would have manpower implications. As we shall discuss later, these manpower implications might be reduced if Congress transfers all sentencing power to military judges in noncapital cases, as proposed by S.2521.

Sentencing by Military Judge Alone

Turning to that proposal, we recognize there are strong arguments on both sides. Indeed, it appears that military lawyers, commanders, and others familiar with military justice are rather evenly divided as to such a change. To transfer all sentencing power to military judges -- who are professionals -- would conform to the American Bar Association Standards for Judicial Administration, expedite sentence proceedings, eliminate occasions for legal error by the judge in advising court members on sentence, and perhaps introduce greater consistency and predictability in sentencing. Of course, military justice then would more closely conform to the civilian model.

Countervailing arguments as to this proposal are: to transfer authority to the judge removes a traditional right of servicemembers; since military judges often ride large circuits, they may not be familiar with local conditions, which should be considered in sentencing; the military judge may belong to a different service than the accused; line officers would be further removed from the administration of military justice; and military judges might become a focal point for severe criticism by commanders, line officers, and others, if their sentences were not viewed as severe enough to maintain discipline.

We have heard that, in some quarters, it is foreseen that if the judges do all the sentencing in noncapital cases, then the average sentence will tend to be greater. Indeed, there are those who feel that this proposal provides a means for obtaining stiffer sentences and ultimately will lead to better discipline. Frankly, the recent dramatic increase in our Court's caseload -- which now is at a record high -- tends to indicate that courts-martial already are adjudging more severe sentences than they did in the recent past. If all sentencing powers are to be transferred to military judges, this change needs a stronger justification than to facilitate adjudging more severe sentences against servicemembers.

The Committee should recognize that the proposed transfer of sentencing power has some significant long-term implications. The selection of court-martial members in a manner quite different from the selection of civilian jurors sometimes has been justified by a supposed difference in functions. See, e.g. United States v. Guilford, 8 M.J. 598, 602 (ACMR 1979), pet. denied, 8 M.J. 242.

If the sentencing responsibility is removed from the members of a court-martial, then their role becomes more similar to that of civilian jurors. In that event, critics of military justice will undoubtedly press again to remove the selection of court members from the control of military commanders and to substitute some system of random selection for the standards for selection of court members now prescribed by Article 25(d)(2). Obviously, part of the rationale for maintaining the present system will be reduced if court members are deprived of their sentencing responsibilities, for which maturity and experience would seem especially important.

Of course, if in the long run the change to sentencing by judge alone is accompanied by a change in the composition of courts-martial, some benefits might accrue. For example, greater use of less senior persons as court members would broaden the manpower pool available for service on courts-martial, so that trials by courts-martial would be less disruptive of normal military operations. Also, a broader base for court-martial membership would make more feasible the increase in the number of peremptory challenges proposed by S.2521. However, expanding the base from which court members are selected might have other effects that have not been thoroughly analyzed.

In pointing to the implications of sentencing by judge alone, our purpose is neither to praise nor condemn the proposal.

Instead, we seek only to emphasize that this feature of S.2521 has some possible implications of which the Committee and the Congress should be fully aware.

In 1974, the House of Delegates of the American Bar Association recommended that the Uniform Code be amended to allow an accused to elect sentencing by judge alone, even if his guilt or innocence had been determined by court members. This proposal -- which provides still another alternative for examination by the Committee -- would modify the present procedure, whereunder an accused must elect either to have both the fact-finding and the sentencing done by court members or to have both done by the military judge, but whereunder no means are available for guilt to be determined by court members and the sentence then to be imposed by the judge.

Suspension Power for Military Judges

If all sentencing power is to be transferred to the military judge, we would favor the provision of S.2521 which would allow him to suspend a sentence, just as trial judges may do in state and Federal courts. Military judges today are persons of high character and ability. The proposal to transfer all sentencing power to them in itself evidences the high regard in which they are held. We believe, therefore, that they will not abuse the power to suspend sentences, if it is conferred upon them. Indeed, if the review of cases in the field is to be curtailed -- as proposed both by Senator Jepsen and by the Administration -- then it would seem especially desirable to provide military judges this authority, since, without a staff judge advocate's review, convening authorities may have less information available to them than today for purposes of determining whether sentences should be suspended and, in turn, may be more reluctant than at present to take clemency action. Allowing military judges to suspend sentences would lessen the risk that clemency action -- especially the suspension of a sentence to a punitive discharge -- might be overlooked in the cases of servicemembers who were good candidates for rehabilitation and retention on duty. Of course, we believe that rehabilitation of salvageable servicemembers is cost-effective in every respect and avoids a loss by the Armed Services of what may have been an expensive investment in training these persons.

Since Courts of Military Review must consider sentence appropriateness in their appellate review of a case, some judges of those Courts have suggested that they also should be empowered to suspend all or part of a court-martial sentence.

Changes in Post-Trial Review

Currently the Uniform Code provides that the convening authority of a court-martial "may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved." Article 64, 10 U.S.C. § 864. Article 61 of the Code, 10 U.S.C. § 861, requires that in acting on a general court-martial, the convening authority shall refer the record of trial to his staff judge advocate or legal officer for a "written opinion". This written opinion -- generally called the staff judge advocate's review -- is also required in special court-martial cases where a bad-conduct discharge is approved.

In requiring a staff judge advocate's "written opinion" Congress apparently had in mind the type of review which the Army had utilized since issuance of the 1921 Manual for Courts-Martial. See United States v. Fields, 9 U.S.C.M.A. 70, 26 C.M.R. 332 (1958). By reason of Manual provisions and judicial interpretations the preparation of the staff judge advocate's review has become a cumbersome task which requires the expenditure of many lawyer hours.

Both S.2521 and the Administration propose elimination of some of the responsibilities of the convening authority; and, incident thereto, the traditional staff judge advocate's review would vanish from the scene. However, the convening authority would still retain his clemency power and, in his discretion, could set aside findings of guilty or reduce a sentence.

Both S.2521 and the Administration would require that in taking his clemency action, the convening authority of a general court-martial shall obtain a "written recommendation" in a special court-martial in which the sentence includes a bad-conduct discharge, while the Administration would require this "if, under regulations of the Secretary concerned, a staff judge advocate is assigned to the convening authority or other person taking action." Under the Administration proposal, there is no requirement that a record of trial be prepared before the convening authority acts or his staff judge advocate prepares the "written recommendation". Since S.2521 requires that the convening authority refer the "record" of the court-martial to his staff judge advocate for a "written recommendation", it would appear that the convening authority cannot act until the record of trial is prepared.

In several respects, we favor S.2521 over the Administration proposal. For one thing, we believe the requirement of the "written recommendation" for a special court-martial case involving a bad-conduct discharge should not hinge on "regulations of the Secretary concerned". Instead, as under S.2521, it should exist in all cases.

Secondly, we believe the convening authority should not take his final action until the record of trial has been prepared. At that point, the accused and his counsel will have the record available as a source of information they wish to bring to the convening authority's attention; and the convening authority will have the record available for whatever consideration he chooses to give it.

The commencement of an accused's service of a sentence of confinement would not be delayed by waiting for the record of trial, since under the Code that sentence, unless deferred by the convening authority, takes effect when adjudged by the court-martial. Moreover, the 1981 amendments to the Code, which originated in this Committee, eliminated distinctions in confinement classification between an accused whose sentence has been adjudged but not reviewed and an accused for whom post-trial review has been completed.

S.2521 may need clarification of its provision that the convening authority of a special court-martial which adjudges a bad-conduct discharge shall submit the record to his staff judge advocate for a "written recommendation". Under current practice, many special courts-martial are convened by commanders who do not have staff judge advocates assigned to them. After the convening authority takes his action, the record is sent to "the officer exercising general court-martial jurisdiction over the command" for his review; and, of course, that officer will have a staff judge advocate assigned to him. See Article 64(b). Since S.2521 deletes the present Code provision for review by an officer exercising general court-martial jurisdiction, it is unclear how the "written recommendation" of the staff judge advocate will be made available to a convening authority who has no lawyer on his staff.

Whether S.2521 or the Administration proposal is adopted, we suggest that, in addition to his powers to disapprove findings and sentence or order revision proceedings, the convening authority also should be authorized, in his discretion, to order a rehearing as to guilt or as to sentence. In this way, he might be able to rectify quickly legal errors that were brought to his attention by defense counsel or otherwise. There should be little objection to providing a commander with an additional tool for use in his discretion.

The savings in time and effort for staff judge advocates and their subordinates that will accrue from the change in appellate responsibilities of convening authorities will depend on how different a "written recommendation" is from a "written opinion". The Manual for Courts-Martial will provide us with guidance in that regard. However, the Committee should recognize that for a staff judge advocate to make a sound "written recommendation" to the convening authority, he will need to assemble some of the same information that now goes into the staff judge advocate's review. Furthermore, the information now compiled in the staff judge advocate's review is used not only by the convening authority but also in subsequent appellate review of a case. Presumably it is considered by clemency and parole officials, as well as for custody-grade classification in confinement facilities. If the information is not compiled by this staff judge advocate, then is it intended that someone else will assemble the information? Or will it be dispensed with entirely? What are the costs of each of these alternatives? When such questions as these have been answered to the President's satisfaction and he has prescribed the contents of the "written recommendation" to be provided by a staff judge advocate, then we will know how much of a change has been made in the present practice.

We cannot estimate how much benefit convening authorities will receive from the changes, since we suspect that their present responsibilities for appellate review may not have been as onerous as some have suggested. Understandably, commanders vary substantially in the time and attention they devote to military justice. Some rely more on their staff judge advocate than do others; some read the staff judge advocate's review meticulously; some rely on his oral summary. Also, we have observed that some convening authorities seem to find that, in performing their appellate review responsibilities, they obtain helpful insights into disciplinary and other problems in their commands.

S.2521 and the Administration proposal removes a safeguard that servicemembers have enjoyed for several decades -- although one for which there has been less necessity as other protections have been made available in military justice. We have not been furnished any statistics which demonstrate fully how much relief accused persons now receive as a result of the appellate review now performed by convening authorities in the field, nor can we predict to what extent that same relief would still be provided through the exercise of the clemency powers of the convening authority. Of course, there should be no change as to those reductions which today are granted by convening authorities under pretrial agreements; and plea bargaining would not be affected by the changes.

To some extent, errors which currently are corrected during appellate review in the field will be rectified by Courts of Military Review. The adequacy of this remedy is reduced somewhat by the circumstance that it does not occur for several months. Moreover, we note that S.2521 increases the threshold for review by a Court of Military Review from a year's confinement to more than a year's confinement. This change, although slight, would deprive some servicemembers of another safeguard now available.

We see no reason for such a change -- especially since first level appellate review in the field would also be curtailed.

Waiver of Appellate Rights

Both S.2521 and the Administration proposal would eliminate automatic appellate review. We certainly subscribe to the proposition that if an accused, when properly counseled, chooses not to appeal a case and wishes to receive his punitive discharge as promptly as possible, then there is no need to grant an unwanted appellate review. Therefore, we would favor authorization for waiver or withdrawal of an appeal by an accused who has been fully advised of his legal rights. Likewise, we would favor a Code amendment which would allow an accused to consent to a summarized record of trial or to reduction of the record of trial to eliminate those portions which he considered irrelevant to his appeal. However, an accused should not be permitted to waive his appellate rights as part of a negotiated pretrial agreement, since in our view this is contrary to public policy.

Furthermore, we oppose the provisions of S.2521 whereby the accused would forfeit appellate rights by inaction on his part or that of his counsel. In the first place, we believe that in most instances a defense counsel will urge the accused to appeal, so that subsequently there will be no claim by the accused that he lost his right of appeal because of failure of his counsel to advise him properly about that right. Secondly, we anticipate that, in many instances where appellate rights were lost by inaction after trial, the accused would blame the loss on his defense counsel, and appellate authorities would be confronted with claims of ineffective assistance of counsel. Finally, in view of the youth of the average servicemember and the scope of the appellate rights in military justice, which include review of facts and of sentence appropriateness, it is important that, if an accused waives his appeal, this take place as a result of a conscious, informed, and thoroughly documented choice on his part.

Instead of treating failure to give notice of appeal as a waiver of appeal, we favor equating it to the giving of a notice of appeal, just as upon failure of a defendant to plead, a plea of not guilty is entered in his behalf.

S.2521 contemplates that at the time a notice of appeal is given the accused and his counsel will specify the issues which he wishes considered on appeal. This procedure does not seem feasible to us. For one thing, when the notice is given, a record of trial frequently will not have been prepared; and specifying appellate issues without having a record of trial is a rather fruitless endeavor. Secondly, in military practice -- unlike many civil courts -- the lawyer who defends the case will not be handling the appeal; and we believe it is more effective to have appellate issues specified by the attorney who will be directly involved in the appeal.

Increase in the Jurisdiction of Special Courts-Martial

Under S.2521, a special court-martial could adjudge a sentence including 12 months' confinement, instead of the 6 months' to which its jurisdiction is now limited. We have not had an opportunity to study statistics from the Armed Services which might tend to demonstrate the need for this proposal. Of course, the statistics must be examined with discernment. The fact that a general court-martial results in a sentence which a special court-martial might have imposed does not mean that the case should never have been referred to a general court in the first place. After all, when the convening authority makes his determination as to the level of court-martial to which a case should be referred, he does not have available all the evidence - including extenuation and mitigation - which is later available to the court members.

In Federal law 6 months' confinement has been the dividing line between "petty offenses" and other offenses; and also for constitutional purposes it provides the dividing line as to the right to a jury trial. Furthermore, under a calculation that is sometimes employed -- which equates a bad-conduct discharge to 6 months' confinement -- then even today a special court-martial can adjudge the functional equivalent of a year's confinement. This, of course, is the dividing line between misdemeanor and felony. 18 U.S.C. § 1. Therefore, in increasing the punishment power of the special court-martial as proposed by S.2521, Congress would basically be authorizing the special court-martial to adjudge a felony-type punishment.

Of course, S.2521 eliminates some existing safeguards for accused servicemembers. For example, a special court-martial is not subject to the screening requirements of pretrial investigation and pretrial advice which apply to general courts-martial under Articles 32 and 34. The Code requirements applicable to judges of general courts-martial under Article 26(c) are more stringent than for the judges of special courts. Furthermore, the special court-martial conviction may receive less detailed review in the field than the general court-martial.

As a partial substitute for eliminated safeguards, the Administration would require that Courts of Military Review review under Article 66 those cases tried by special court-martial in which the accused was sentenced to more than 6 months' confinement but no bad-conduct discharge was imposed. If the jurisdiction of the special court-martial is increased, then we believe the Administration proposal should be adopted. However, adopting the proposal would yield significant benefits only if Courts of Military Review process such cases rapidly, so that an accused's case is reviewed before all of his confinement is served.

Obviously, this Committee and the Congress must determine whether the possible cost savings and other benefits that might result from expanding the jurisdiction of special courts-martial offset the loss of safeguards for servicemembers. Since the proposed change will alter jurisdictional limitations that have applied to special courts-martial for several decades, we urge the

Committee to obtain as much statistical and other information as possible in considering this proposal.

Drug Offenses

S.2521 would add to the Uniform Code an Article 112a -- a detailed punitive article concerning controlled substances, which follows closely the Federal Controlled Substances Act of 1970. As we recently made clear in our opinion in United States v. Ettleson, 13 M.J. 348 (C.M.A. 1982), a need exists for Code amendments or for revisions to the Manual for Courts-Martial, which would deal more specifically with drug offenses. Recently, notice was given in the Federal Register of a proposed revision to the Manual for Courts-Martial, whereby the handling of drug offenses by courts-martial would be more in line with that in the Federal District Courts. This revision, which is scheduled to take effect next month, will remedy many of the present omissions.

In cases like United States v. Trottier, 9 M.J. 337 (C.M.A. 1980), and United States v. Middleton, 10 M.J. 123 (C.M.A. 1981), our Court has demonstrated its concern with the problem of drug abuse in the Armed Services. Thus, we praise Senator Jepsen's effort to provide a sounder legal foundation for attacking drug abuse. However, in this instance, we would suggest that the approach taken by S.2521 may be unduly cumbersome and that, just as for other crimes, the prescription of maximum punishment for drug offenses should be left to the President. In our view this flexibility is desirable in meeting military needs.

If a new punitive article is to be added to the Uniform Code, we would suggest that it be stated in general terms, such as these:

> Any person subject to this chapter who, without a valid prescription or other legal authorization or justification, uses, possesses, manufactures, distributes, imports, exports, or introduces into an installation, vessel, vehicle, or aircraft used by the armed forces or under their control, opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, secobarbital, marijuana, or any compound or derivative thereof or any other drug or substance which is listed in Schedules I-V, or any other Schedule, of 21 U.S.C. § 812, or any successor provisions thereto, or any Schedule of drugs or controlled substances issued by the President, shall be punished as a court-martial may direct.

While the foregoing language is based on the proposed Executive Order concerning drugs, it has not been submitted to the Joint-Service Committee or the Code Committee for consideration; and so it may contain some defects. We offer this only by way of illustration; but if the Committee determines that a punitive Article concerning drugs should be part of the Uniform Code, our Court will be happy to cooperate with the Administration in proposing concise statutory language to deal with drug abuse and related matters.

If a new punitive article is enacted to deal with drug offenses, its language or legislative history should make clear whether Congress intends to preempt the prosecution of drug or drug-related offenses under Article 134 or prosecutions under Article 92 for violation of service regulations concerning drugs, drug use, or drug paraphernalia. Indeed, one reason for great care in drafting a new punitive article on drug offenses is to avoid unwanted consequences that might accrue under the doctrine of preemption or otherwise.

The proposed Executive Order contains many detailed and carefully prepared provisions concerning prosecution of drug offenses; and if the committee favors these provisions, perhaps this should be indicated in the legislative history of any new punitive article.

Certiorari

The Administration proposes that the Supreme Court be authorized to review the decisions of our Court on writ of certiorari. In terms of legal symmetry this proposal has some appeal. Moreover, it would provide the Government with a remedy if our Court, on constitutional or other grounds, rendered opinions which appeared to be inimical to military discipline. Presumably, we would have even greater visibility if our opinions were reviewable by certiorari; and this might tend to enhance the Court's stature.

While these arguments are appealing and we do not object to the concept underlying the Administration proposal, there may be some practical disadvantages. Obviously, some costs will be incurred by the Armed Services in connection with providing lawyers to handle the petitions for certiorari. Also, the Department of Defense and the Solicitor General's Office will incur a new burden in connection with preparing responses to certiorari petitions submitted by accused servicemembers. We do not know the magnitude of the costs involved; but they should be balanced against any anticipated benefits. Secondly, the certiorari process will produce further delays in completing the appellate review of courts-martial; and, in cases where a punitive discharge has been adjudged by a court-martial, separation of an accused from the service may be further postponed to allow the Supreme Court an opportunity to review his petition for certiorari. Fortunately, the provisions for involuntary appellate leave which originated in this Committee and were enacted last year by the Congress have reduced the significance of this problem.

Thirdly, under the Administration proposal, the establishment of certiorari jurisdiction over cases tried by courts-martial will further increase the Supreme Court's already heavy docket. Obviously, the Justices of the Supreme Court can best speak to this problem; and, in fairness to them, their views should be solicited before the proposal is adopted. We have observed that in recent years the Supreme Court has emphasized the uniqueness of military justice, and it seems rather doubtful that a writ of certiorari will be granted in many court-martial cases. In light of that probability and since the time of the members of the Supreme Court is itself an important national resource, the Congress -- hopefully in conjunction with the Supreme Court --

should decide whether the benefits from adoption of the Administration proposal would counterbalance the disadvantages.

It has been suggested that the availability of certiorari may lessen collateral attacks on courts-martial. We have not seen recent figures concerning the current level of collateral attacks; and so we cannot evaluate the magnitude of this problem. However, denial of a petition for certiorari does not preclude collateral attacks that otherwise could be undertaken successfully. Undoubtedly the Committee is familiar with cases where, after exhausting his remedies on direct appeal by petitioning the Supreme Court for certiorari, a convicted defendant has then undertaken collateral attack on his conviction in a Federal District Court.

The Administration proposal seeks to mitigate the possible burden on the Supreme Court by imposing a limitation that certiorari cannot be granted on an accused's petition unless our Court has granted review in the first instance. Thus, for an accused -- but not for the Government -- our Court would hold the key allowing access to the Supreme Court. We are not aware of any other instance in which the jurisdiction of the Supreme Court presently is controlled by a lower court in this manner; and so we have no experience to draw upon in evaluating the desirability of such a limitation.

Currently, our Court denies by order an overwhelming number of the petitions that are submitted to us. However, from time to time, as issues arise which are common to many cases, our percentage of grants of review increases markedly. Thus, the number of cases that would be eligible for Supreme Court review under the Administration proposal could fluctuate dramatically. For example, in the wake of certain Supreme Court decisions concerning trial by jury, our Court received many petitions which raised the issue whether courts-martial were subject to jury requirements imposed by Supreme Court precedents. We did not grant those petitions; but, had we done so, a substantial number of "trailer" cases would ultimately have been granted review.

Under the proposal our Court would be confronted in many cases with a choice between denial of a petition for review which would deny the accused access to the Supreme Court, and summary affirmance, which would have the same legal consequences but would allow the accused to submit a petition for certiorari to the Supreme Court. To the extent that our Court utilized the second alternative, there would be an increase in the number of cases eligible for review by the Supreme Court. Thus, in evaluating the Administration proposal concerning certiorari, the Committee should recognize that it is difficult at this time to predict accurately how many cases might be taken to the Supreme Court upon petition for writ of certiorari.

Since our decision whether to grant review would determine eligibility for certiorari, we are unsure whether the Supreme Court could entertain a petition for extraordinary relief in a case in which we had not yet granted review. Hopefully, even if they had the power to do so, the Court as a matter of discretion would seldom intervene in a case tried by court-martial until we had decided whether to grant review.

Discharge Review and Correction Boards

Both S.2521 and the Administration would impose specific limitations on the powers of Discharge Review Boards and Boards for the Correction of Military Records. Thus, the Discharge Review Boards would no longer be allowed to review bad-conduct discharges imposed by special courts-martial; and the Correction Boards would be specifically restricted to clemency. Our Court believes that these statutory Boards, composed chiefly of non-lawyers, should not be allowed to overrule our decisions on matters of law. Moreover, by virtue of our extraordinary writ power, a procedure is available whereby we may consider legal issues raised by accused persons in cases that have not yet reached us directly under Article 67 or in cases in which direct appellate review has already been completed. Therefore, we believe that no need exists for these boards to consider issues of law arising in trials by court-martial. Indeed, under established principles of exhaustion of remedies, these boards currently should not decide a legal issue concerning a court-martial conviction, if no effort has been made by the applicant to raise the issue in our Court or the Court of Military Review by means of extraordinary writ or to invoke the jurisdiction of the Judge Advocate General under Article 69 of the Uniform Code.

Under the Administration proposal the Discharge Review Boards would no longer have any jurisdiction over bad-conduct discharges adjudged by special courts-martial -- even to grant relief as a matter of clemency. We have not seen any statistics as to the number of applications received by these Boards with respect to bad-conduct discharges or as to the number of cases in which relief is granted. Thus, we have little basis to evaluate whether the Administration proposal removes any significant burden on these Boards or eliminates an important safeguard for servicemembers. Perhaps some of the veterans organizations -- such as the American Legion or Veterans of Foreign Wars -- might have some views on this topic since I believe they provide counsel to former servicemembers as to relief available from these boards.

In some instances and for some purposes, such as veterans benefits, the bad-conduct discharge from a special court-martial is akin to an administrative discharge under other than honorable conditions. Of course, the Discharge Review Boards review a substantial number of administrative discharges; and perhaps there are some advantages in permitting these Boards to consider bad-conduct discharges from special courts-martial.

On the other hand, the Uniform Code provides some safeguards in courts-martial that are not granted in connection with administrative discharges; and so the likelihood of a miscarriage of justice is less when a bad-conduct discharge is adjudged than when an administrative discharge is issued. However, since S.2521 and the Administration proposal both contemplate removal of some safeguards of appellate review now applicable to bad-conduct discharges adjudged by special courts-martial, it may be going too far to eliminate simultaneously the power of Discharge Review Boards to grant relief as to bad-conduct discharges.

Continuing Reexamination of the Code

We suggest that the Uniform Code receive a continuing, thorough examination to determine whether any of its provisions would be unworkable under combat conditions or under emergency conditions like those which surrounded the recent deployment of Naval forces in the Indian Ocean. The Code already provides for certain variations of procedure in time of war -- for example, with respect to the applicable statute of limitations. *See* Article 43, 10 U.S.C. § 943. There may be other instances in which wartime exceptions should be created. Moreover, perhaps these exceptions should be defined in terms of functional criteria rather than based on the existence of "war", since in modern times hostilities often have not been accompanied by declarations of war. On the other hand, provisions of the Uniform Code should not be changed simply because they might not work effectively in wartime. Our servicemembers should not be deprived of safeguards during peacetime merely because those safeguards might not be feasible in the event of hostilities.

Uniformity

Furthermore, we believe that, insofar as possible, military justice should be uniform among the Armed Services. This policy was adopted by Congress soon after a war in which our nation mobilized the largest armed forces in its history. The legislative judgment made at that time should not be lightly overturned. Indeed, that judgment seems all the wiser as the Armed Services make increased use of joint task forces and unified commands. When members of several services are serving in the same command, it would seem anomalous to have the kind of justice received depend on the color of the uniform worn. Also, uniformity facilitates cross-utilization of legal and paralegal personnel, which in turn can reduce costs. For example, in Hawaii the Air Force frequently uses Army military judges located there, rather than incur the expense bringing its own judges out from the mainland.

Other Areas of Study

It was suggested to us that we should call attention to other changes in the Uniform Code which might be desirable. We already have attempted to do this in correspondence directed to your Committee staff. For example, there, we noted that, despite proposals that have been pending in various forms for 20 years, there still exists a jurisdictional gap as to the punishment of civilian dependents or employees who accompany the Armed Forces overseas and as to former servicemembers whose crimes are discovered after they have been discharged. Apparently, there were plans to deal with such situations in connection with revising Title 18, the Criminal Code. However, in view of the delays and uncertainty in completing that project, we suggest that the Congress consider extending the jurisdiction of Federal District Courts to authorize trial of civilian dependents and employees and former servicemembers for violating punitive Articles of the Uniform Code. Some other possible areas for legislative action have, at least indirectly, been adverted to in earlier portions of our statement; and they can be discussed later in more detail if the Committee desires.

Conclusion

Finally, let us emphasize that some of the proposals now before you are of a housekeeping nature and are relatively noncontroversial. Others merit very detailed further study. Recognizing that these Hearings have come at a late stage of the current Session of the Congress, we suggest, as an alternative for your consideration, that the noncontroversial portions of S.2521 and of the Administration proposal might be merged in some form for immediate action by the Committee and that the remaining provisions be further examined after the new Congress has convened. Thus, military justice could benefit more immediately from such changes as those on which there is general agreement:

1. Authority for appeals by the Government;

2. Authorization of reconsideration *en banc* by Courts of Military Review;

3. Authorization of videotaped records of trial;

4. Permission to make oral requests for trial by military judge alone;

5. Simplification of excuses and appointments of court-martial personnel;

6. Simplification of pretrial advice in general courts-martial;

7. Establishment of an equitable judicial retirement program;

8. Authorization for waiver of appellate rights and withdrawal of appeals;

9. Enactment of a punitive article for drug offenses.

Other more technical changes, on which we have not commented, such as a revised definition of "judge advocate" and expansion of the Article 67(g) Code Committee to conform to current practice, could also be included.

Whether the Committee chooses to proceed immediately with the less controversial amendments to the Code or to await completion of studies of the probable effects of the more far-reaching changes, we are grateful for your interest in military justice and for this opportunity to state our views. Of course, we shall be happy to answer any questions that you may have at this time.

Senator **Jepsen**. Thank you.

The questions that we have we will insert for the record and ask that you reply to them. We have explored some of the key issues already, as you know.

I do want to thank you for your testimony and look forward to continuing to work together.

Judge **Everett**. Thank you very much, Mr. Chairman, and we will be delighted to respond to your questions for the record.

[The questions with answers supplied follow:]

RESPONSES TO
QUESTIONS FOR THE RECORD
for the
UNITED STATES COURT OF MILITARY APPEALS

September 30, 1982

1. Reaction of Commanders/Defense Counsel

a. Judge Everett, I understand that you recently returned from a trip to Europe. During that trip and any other visits to installations you have made over the past six months did you get any reaction from military commanders concerning these proposed changes to The Uniform Code? What was it?

In my recent visits to military installations in Europe and elsewhere, I found that commanders were interested in proposed changes to the Uniform Code but in many instances were not aware of the specific changes being proposed. For the most part, I believe the commanders favor the proposed increase in the jurisdiction of the special court-martial. As to proposed changes in the appellate responsibilities of the commanders, I did not hear many complaints that the present system is too burdensome for commanders themselves. Apparently, many commanders rely heavily on their staff judge advocate to summarize for them orally the written staff judge advocate's review. Several commanders described to me how, as a matter of choice, they personally review records of trial -- often at night and on the weekends -- because they find this to be helpful in learning about disciplinary conditions in their commands.

As far as sentencing by judge alone is concerned, the commanders in the Navy with whom I talked seem more disposed to this change than are those in the Army and the Air Force. Overall, I found no overwhelming sentiment to make major changes in the Uniform Code at this time and a fairly general feeling of confidence in military justice, although there was a strong desire to improve its efficiency even more and to prepare for combat conditions. Most commanders are very pleased by the statutory changes made last year, which limit the right to individual military counsel and which allow convicted servicemembers to be placed on involuntary appellate leave while review of their cases is being completed.

b. Did you get any reaction from military defense counsel? Military judges? What was it?

Military defense counsel seemed generally to oppose most of the major changes proposed by S.2521; and they perceived these changes as being directed at curtailing rights of accused persons. However, I heard very little adverse comment from defense counsel about the proposals to authorize appeals by the Government. A majority of military judges favor the proposed transfer to them of all sentencing power and the elimination of an accused's right to be sentenced by court members. An even more substantial majority of judges favor granting power to military judges to suspend sentences they adjudge.

2. One-Judge Grant of Petition for Review

a. Judge Everett, do you agree with the ACLU proposal that one judge of the Court of Military Appeals be sufficient to grant a petition for review by that Court. If not, why not?

I do not favor the ACLU proposal that one judge of the Court of Military Appeals be sufficient to grant a petition for review by our Court. It is my observation that in almost every instance the grant of the petition by one judge -- as proposed by the ACLU -- would not change the outcome of the case but would only delay it. Generally speaking, it has been my experience that if one judge perceives a possible issue and is very anxious to have review granted, he can usually persuade another judge to grant the petition for review, and obtain additional briefs. Also, a judge can express his view on denial of a petition for review by dissenting from the denial. I understand that at one time in its history our Court followed for a while an informal practice of allowing grants of review at the request of one judge, and the result was an overloading of our master docket with cases which were later held to be meritless. Incidentally, we follow the practice that if for some reason only two judges are available to vote on a petition -- e.g., in the event of a disqualification, protracted absence, or vacancy on the Court -- then, upon vote of either judge, a petition for review will be granted; and I think this practice -- which requires a majority vote to deny a petition for review -- is quite desirable.

Apparently, the proposal for grants by one judge is relevant to the Administration's certiorari proposal, whereunder access to the Supreme Court depends on a prior grant of review by our Court. Obviously a one-judge grant rule would increase the number of cases eligible for review by the Court.

3. Provisions Related to Retirement by the Judges of the United States Court of Military Appeals.

a. Judge Cook, should the judges of the United States Court of Military Appeals be removable for mental or physical disability? If not, why not? Are judges of other Article I courts removable for such causes?

I have no objections to the provision providing that the judges of the United States Court of Military Appeals be removable for mental or physical disability and neither do my Brothers. In the United States Tax Court, there is a provision which reads:

> (2) Whenever any judge who becomes permanently disabled from performing his duties does not retire and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President shall declare such judge to be retired. [26 U.S.C. § 7447(h)(2).]

Such a provision merely would place us in the same status as that of the judges of the other major Article I court.

4. United States Court of Military Appeals Retirement: Transition.

a. Judge Cook, can the judges of any other Article I or Article III court receive full retired pay so long as they have completed 10 years of service?

Yes, but a further explanation is required.

Any Article III court judge may retire after attaining the age of 70 and serving for 10 years. Otherwise, such judge may retire at age 65 after serving 15 years. In the case of all Article III judges, however, full pension rights are vested after 10 years of service in cases of disability retirement.

In the case of a judge of the United States Tax Court whose term is statutorily set at 15 years, the same rules are applicable, i.e., full retirement after serving 10 years and attaining the age of 70; otherwise, upon completion of 15 years and reaching the age of 65. However, there are two exceptions, i.e., where the judge is not reappointed and has given notice to the President that he or she is willing to accept reappointment to the United States Tax Court, and where there is a disability retirement after serving at least nine-and-one-half years, plus one day. Upon retirement, the judge is entitled to retirement at the same rate of pay as an active judge.

b. How does the transition provision in S.2521 affect the judges presently sitting on the United States Court of Military Appeals?

At the present time, the judges of the United States Court of Military Appeals receive only the retirement of Civil Service retirement system, which is a disincentive for service on the Court. Until 1980, the judges' terms were for 15 years, but in computing the time of appointment, the term of a judge appointed to fill a vacancy left by a predecessor would expire 15 years after the expiration of the term for which the predecessor judge was appointed, i.e., only for the unexpired portion of the term of his predecessor. Each of the current judges was originally appointed to serve out an unexpired term. When I completed the term of my predecessor, I was reappointed to a full 15-year term which expires May 1, 1991. In December, 1980, this provision of law was changed to make all terms of service 15 years for future appointees. The 1980 change extended the term of Chief Judge Everett from April 16, 1980, to April 15, 1990--a total of 10 years. Judge Albert B. Fletcher, Jr., took office on April 30, 1975, for an unexpired term which ends on May 1, 1986. When their current terms have expired, neither Chief Judge Everett nor Judge Fletcher will have served 15 years and neither of them will have been employed by the Federal government for 20 years, as is required by the Civil Service retirement system to receive any immediate retirement benefits. In fact, Judge Fletcher will not be eligible for any retirement benefits until approximately one-and-one-half years after his term expires.

We strongly support the transitional retirement provision of S.2521.

5. Appeals by the Government

a. Judge Fletcher, Judge Everett's statement notes a provision in the North Carolina General Statutes relating to government appeals in connection with a motion to suppress. Does the federal government have a similar right to appeal under 28 U.S.C. 3731?

The federal government's right to appeal a decision, judgment or order of a district court in a criminal case is found in 18 U.S.C. §3731 (1971). It states:

> §3731. Appeal by United States
>
> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the

> evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.
>
> As amended Jan. 2, 1971, Pub.L. 91-644, Title III, § 14(a), 84 Stat. 1890.

It is clear that the federal government does have a right to appeal a decision or order of a district court suppressing or excluding evidence in a criminal proceeding. In my opinion, this statute should be the model for any government appeals statute enacted for the military justice system. See Article 36, Uniform Code of Military Justice, 10 U.S.C. §836.

b. Both proposals contain provisions which would avoid charging to the prosecution for speedy trial purposes delays directly attributable to such appeals. Do you agree with the observation that "neither of these provisions is well-founded since if a prosecution appeal was not only unmeritorious, but frivolous, the delay should be most definitely charged to the prosecution for a speedy trial purposes." If not, why not?

The question raised by the committee is whether the proposed provisions which avoid charging the prosecution for speedy trial purposes with delays directly attributable to government appeals is well-founded. No such provision is found in 18 U.S.C. §3731. No justification in terms of military necessity or otherwise has been offered for the inclusion of such a provision in either of the proposals. Accordingly, in view of Article 36, UCMJ, these provisions have not been shown to be well-founded.

I would note additionally that the two proposals jointly treat a government appeal from an order terminating a proceeding with a government appeal from an order suppressing or excluding evidence. In 18 U.S.C. §3731, these different types of orders are treated separately. More importantly, a certification procedure is provided in 18 U.S.C. §3731 to discourage frivolous, unmeritorious or dilatory appeals by the government with respect to suppression motions. A notification procedure is provided in these two proposals but it is not clear whether it should be understood to be the equivalent of the certification procedure in 18 U.S.C. §3731. Again, no justification as a matter of military necessity or otherwise has been offered to support the express omission of the certification requirement.

6. Sentencing by Military Judge

a. Has the Court seen any data which relate to the question of the consistency and severity of sentences by military juries vis-a-vis military judges? If so, please provide that data for the record?

(1) We have not seen any statistical data which bears directly on the consistency and severity of sentences by military juries vis-a-vis military judges. Furthermore, even though we have automated our court records, the categories under which we compile data on the cases reaching our Court do not provide information relevant to this inquiry. A meaningful comparison between sentences by military judges and juries is impossible without narrowing the field of cases to those involving single offenses versus multiple offenses; specific types of offenses tried; or mitigating or aggravating factors that may have been considered (prior convictions, Article 15's, awards, etc). Furthermore, this Court sees only a small proportion of the total cases tried. If the sentence adjudged or ultimately approved is less than a punitive discharge or confinement for one year, the record will never be reviewed pursuant to Articles 66 or 67. Moreover, the appellant may never petition this Court for a grant of review if he is satisfied with the results in his case. For these reasons, comparative figures on the severity of sentences can best be obtained from the different services.

(2) From our visits to the field and conversations with trial personnel and others, we are aware that the

sentences of particular judges are frequently quite consistent and predictable. Thus, if a particular military judge is the only judge who tries cases in a certain command, his sentences usually are more consistent and predictable than those of military juries in that command; and there may be a high or low percentage of bench trials because of defense counsel predictions as to the sentences that the judge would impose. However, we have no information about the consistency of sentences among different military judges of the same service or of different services.

b. In roughly what percentage of the cases reviewed by the Court are there allegations of legal error by the judge in advising court members on sentence?

From a sample of 100 pending cases, which we chose at random, there were 26 involving military juries; and in none of these cases were there allegations of legal error by the judge in advising court members on sentence. Of course, even when a jury has been waived, there may be claims that a legal error has been made in the sentencing proceedings.

c. In roughly what percentage of the Court's cases are sentences currently being imposed by judges?

We do not categorize the cases that reach us in terms of whether there was a request for trial by judge alone. However, we believe that the percentage of court cases in which sentences are currently being imposed by judges varies greatly by Service, command and type of court-martial. We have spot-checked 100 pending cases, chosen at random, and find the following:

SERVICE 1/	GENERAL COURT MJ	 MEMBERS	SPECIAL COURT MJ	 MEMBERS
ARMY	14	8	22	5
NAVY	6	1	20	3
AIR FORCE	8	7	4	2
TOTAL	28	16	46	10

1/ No Coast Guard Cases.

7. Suspension of Sentences

a. Does the Court believe that the military judge should be allowed to suspend the sentence in a case where the judge did not impose the punishment (i.e. where the sentence was imposed by a court)? If not, why not?

We certainly would not favor granting suspension power to a judge in the cases tried by jury if he were not also granted this power in the cases where the trial was by judge alone and he adjudged the sentence. If the judge is granted suspension power in trials by judge alone, we would not oppose extending this power to the judge when the military jury adjudged the sentence. The suspension power would be especially desirable if the role of the convening authority in appellate review is reduced.

b. Does the Court favor suspension authority for the Courts of Military Review? If not, why not?

Up to this point we have not solidified our views on this issue pending an opportunity to discuss such a proposal in more detail with members of Courts of Military Review and others and to determine what would be the advantages and disadvantages of the proposal. Unlike the judge and jury at trial, the Court of Military Review does not see the accused and by the time it receives the record for review the information therein may be somewhat stale. Perhaps there are other agencies within the Armed Services which, at that point in time, are in a better position to determine whether the sentence should be suspended. Also, our answer in this question might be affected by proposed changes in the role of the convening authority on appellate review.

8. Post-Trial Review

a. Judge Everett, is a convening authority less likely to exercise his post-trial powers if such exercise is not based on a legal opinion from the staff judge advocate? If not, why not?

I believe that the typical convening authority will be cautious in the exercise of his post-trial powers and will not set aside findings or reduce sentences unless he has some information that gives him a sound basis for doing this. To the extent that he is not provided such information by the record of trial or by the staff judge advocate's review, he will be less likely to exercise his post-trial powers. On the other hand, in those instances where the staff judge advocate has set forth in written form the reason for the convening authority to take certain action and this written opinion, together with the convening authority's action, will accompany the record of trial to a higher echelon of command, then a convening authority will be especially hesitant to reject the action recommended by the staff judge advocate. Undoubtedly, a convening authority will be reluctant to disapprove findings of guilty or reduce a sentence on legal grounds without a convincing legal opinion from his staff judge advocate as to the reason for doing so, and frequently the convening authority will want that opinion in written form. Both S.2521 and the Administration contemplate a reduction in the information which the staff judge advocate currently provides the convening authority in his review. To whatever extent information which the convening authority considers significant would no longer be provided him by the staff judge advocate, there will be a commensurate reduction in the convening authority's exercise of his statutory powers.

b. In your judgment, what should the staff judge advocate's "written recommendation" include so that it can be useful to the convening authority? Do you believe this ought to be prescribed in law? If not, why not?

In my judgment the staff judge advocate as a minimum, should state in his "written recommendation": (1) that, from his review of the record and consideration of any Article 38(c) brief, either it appears that there has been no legal error prejudicial to the rights of the accused or, conversely, that the accused has been prejudiced by certain described errors; (2) that the sentence adjudged is appropriate or else that some lesser sentence would be appropriate; and (3) that clemency action should be taken or else it is not necessary. Also, he should recommend specific action for the convening authority to take. I think that it would be desirable to have the staff judge advocate on record as to these matters and that the Code should so prescribe. Any additional requirements for the "written recommendation" can be set forth in the Manual or in Departmental regulations.

c. Do you frequently see cases based on some error by the convening authority in the conduct of his reviews? What kinds of errors? Will the changes proposed by the Department and S.2521 rectify those possibilities for error?

Many of the claims of error concern the staff judge advocate's review, rather than the action by the convening authority. They include administrative mixups about service of the review on the defense counsel for his response. With respect to the frequency of claims of error during review by the convening authority, we found, in a spot check of 100 cases in which petitions for review were submitted to our Court, that 10 alleged some error during review by the convening authority. The most frequent claim of error was failure to reduce a sentence that was too severe. Others were inordinate delay by the convening authority in taking action and approval of findings allegedly not supported by "sufficient evidence." To some extent the changes proposed by S.2521 and by the Administration will rectify the possibilities for error by reducing the role of the convening authority in appellate review and by eliminating the traditional staff judge advocate's review. On the other hand, possibilities of error will remain with respect to the preparation and service of the "written opinion", which the staff judge advocate would still be required to prepare. Also, there will be reduced, if not eliminated, the present opportunity for a convening authority to correct legal error promptly in the field, rather than let the accused await possible correction of the error later in Washington.

d. Would you feel any differently about elimination of the post-trial legal review if in all cases where the accused was sentenced to more than 6 months confinement the accused could go to the Court of Military Review?

Allowing the accused access to the Court of Military Review in all cases where he has been sentenced to more than six months confinement has been proposed by the Administration in connection with the proposed increase in the jurisdiction of the special court-martial. While this would be a desirable provision if special court-martial jurisdiction is expanded, in many cases involving sentences to more than 6 months confinement punitive discharges also have been adjudged; and so they would already be eligible for review by the Court of Military Review under existing law. Indeed, paragraph 126b of the 1951 Manual for Courts-Martial provided that an accused should not receive a sentence to more than six months confinement if a sentence to a punitive discharge had not also been adjudged; and although this restriction was struck down as an unwarranted limitation on a court-martial's sentencing power, it embodies a policy that still is followed extensively by judges and court members in sentencing. Thus, this proposed change has limited relevance in deciding whether special court-martial jurisdiction should be expanded.

9. Notice and Waiver of Appeal

a. Both proposals would require the filing of a notice of appeal before a complete record is prepared in certain cases. Doesn't this put the accused (and his defense counsel) in a Catch-22 position? They may need the record to prepare a post-trial brief to the convening authority and therefore must file a notice of appeal to get the record.

A defense counsel will be -- or certainly should be -- hesitant about advising an accused not to appeal unless a complete record is available for examination to determine what legal errors may exist. To the extent that a notice of appeal is required for obtaining a record of trial, then there will be a strong inducement for defense counsel to file a notice of appeal. Indeed, a notice of appeal will probably be filed as a matter of routine by competent defense counsel; and whenever a counsel fails to give this notice, we anticipate that there may be complaints that the lawyer was incompetent.

10. Expansion of Jurisdiction of Special Court-Martial

a. Has the Court seen any statistics which support the proposition that there would be less general courts-martial if the jurisdiction of a special court-martial is expanded to one year? If so, please provide them for the record.

We have seen the statistics presented by General Bruton and Admiral Jenkins as to the number of cases tried by general court-martial in which the sentence was no greater than that which could be adjudged by a special court-martial under S.2521. Information concerning the most recent cases reviewed by our Court is stored in our computer. Of the last 2,410 cases involving trials by general court-martial, we have sentencing information for 1,518, of which 542 had sentences of one year or less.

However, in 10 % of these cases, the sentence included a dishonorable discharge or dismissal -- punishments which a special court-martial could not adjudge either under S.2521 or under present law. In 165 of the 542 cases, the confinement was 6 months or less -- which is the current sentence limitation on a special court-martial. Thus, even today some cases referred to general courts-martial result in sentences that special courts-martial could adjudge. The reasons for this include acquittal of some charges referred for trial; conviction only of a lesser included offense; dismissal of some charges pursuant to a plea bargain; and defense evidence in extenuation and mitigation.

Conversely, under current practice some cases may be sent to a special court-martial for convenience reasons, when a general court-martial might be more commensurate with the offenses charged; and the proposed expansion in the jurisdiction of a special court-martial might encourage this tendency.

b. Would the Court predict with certainty that a reduction in general courts-martial would occur?

We cannot predict with certainty that a substantial reduction in cases tried by general court-martial would occur as a result of increasing the punishment powers of special courts. Indeed, we doubt that many cases referred for trial by general court-martial today would be sent to special court-martial merely because the maximum confinement had been increased from six months to one year. Instead, we believe that many cases are referred to general courts-martial because the offenses alleged may warrant dishonorable discharge or substantial confinement or because the greater sentencing powers of general courts-martial may encourage plea bargaining by the defense.

c. Should the Congress be changing jurisdiction of the special court-martial just to possibly reduce the number of general courts-martial?

Certainly it would be desirable to reduce the number of general courts-martial, if there were no offsetting disadvantages. Trial of a general court-martial typically involves direct and indirect costs not encountered in a special court-martial. Our concern is that the reduction in the number of general courts-martial will be minimal, but that there will be a substantial diminution in the rights of service members, who will become subject to more severe punishment by special court-martial than is now allowed.

d. Would the Court feel any differently about this proposal if in all cases where the accused was sentenced to 6 months confinement the case could be taken to the Court of Military Review?

This question refers to a sentence "to 6 months confinement." In question 8d there was a reference to "more than 6 months confinement". We do not recommend the expansion of the jurisdiction of Courts of Military Review to allow consideration of a sentence including only 6 months confinement without any discharge; but for sentences greater than 6 months, we favor allowing such review if the jurisdiction of special courts-martial is expanded. However, as indicated in our answer to question 8, this expansion of jurisdiction probably will not have any great effect because a sentence to more than 6 months confinement usually will be accompanied by a discharge.

e. Isn't the accused being required to give a substantial and significant bundle of important rights when he no longer must go before a general court-martial to get a year in jail? What are those rights? Is there any rationale for doing this other than potential cost savings and administrative convenience?

(1) If the jurisdiction of the special court-martial is expanded, certainly the rights of the accused will be diminished in several respects. He will be subject to up to 12 months confinement without the pretrial investigation required by Article 32 of the Uniform Code or the pretrial advice required by Article 34. Since a special court-martial often can be convened at a lower level of command, the decision to proceed to trial may be made by a less experienced commander than the convening authority of a general court. There is a difference in the minimum time required between service of charges and commencement of trial. See Article 35. The military judge who tries a special court-martial may not be subject to the same safeguards that apply to the military judge who tries a general court-martial. See Article 26. Typically, a general court-martial will have more court members to adjudicate guilt than a special court-martial. Furthermore, under Article 19 of the Uniform Code the safeguards of a verbatim record, a military judge, and legally trained counsel are not as ironclad for the special court-martial as for the general court-martial; and we recommend to the Committee that if a special court-martial is allowed to adjudge more than 6 months confinement this power be subject to the same limitations applicable to imposition of a bad-conduct discharge.

(2) Apart from the potential cost savings and administrative convenience, the rationale for this change

seems to hinge in part on a distinction between misdemeanor and felony, as defined in 18 U.S.C. § 1. However, in our statement during the hearings we pointed out that this distinction may not be completely applicable and that a more relevant distinction may be at the level of 6 months confinement, which is the litmus test for the constitutional right to jury trial in State and Federal courts. An additional rationale for the change is that special courts-martial today have greater safeguards than in 1951 when the Uniform Code took effect.

f. What is the Court's understanding of the original rationale behind the 6-month jurisdiction for a special court-martial? How has that rationale changed?

We do not know the original rationale behind the 6-month jurisdiction for a special court-martial. However, for many decades this has been the maximum confinement a special court-martial could adjudge. In 1951, the President prescribed in the Manual for Courts-Martial that an accused should not be sentenced to more than 6 months confinement if a punitive discharge was not adjudged. Presumably this limitation reflected a policy judgment that, if a servicemember were to be retained in uniform, his rehabilitation usually would not require more than 6 months confinement. If that judgment remains valid, then a special court-martial would only need the proposed expansion of sentencing power to deal with the cases in which bad-conduct discharges are adjudged. However, if an accused is being discharged and if his offenses are not serious enough to merit a general court-martial, there may be little benefit to the Armed Services in having him in a military confinement facility for more than 6 months. The additional confinement that could be adjudged by a special court-martial under S.2521 would seem to have little added deterrent effect. Thus, unless longer periods of confinement than 6 months are needed for rehabilitation of an accused after he has been convicted by special court-martial, there may be no more need now to expand its power than existed in 1951.

In limiting the special court-martial to 6 months confinement, Congress also may have recognized that the safeguards in such a tribunal were less than in general courts-martial. The expansion of safeguards surrounding the special court-martial, which was accomplished by the Military Justice Act of 1968, has provided a servicemember many protections in a special court-martial which previously were available only in a general court-martial. To that extent, the justification for allowing only 6 months confinement to be adjudged by a special court-martial has been reduced. However, since substantial differences still exist between the protections available for a general court-martial and those for a special court-martial, the reasoning that may have persuaded Congress to limit the special court-martial to 6 months confinement is not completely outdated.

g. In the Court's judgment would cases in the military services be equally affected by the proposal to expand the sentencing jurisdiction of a special court-martial? For example, is there a potential for more cases in the Navy being affected than in the Air Force? If so, how do you account for this difference?

For a variety of reasons, the Air Force has always had a much smaller caseload of courts-martial than the Army or the Navy. Thus, the expansion of the sentencing jurisdiction of a special court-martial should have much less impact on the Air Force than on the Army and Navy. Of course, for the Coast Guard, the court-martial caseload is so low that it should be only slightly affected by expansion of the sentencing jurisdiction of a special court-martial. The Army and the Navy engage in plea bargaining much more extensively than the Air Force; and if the jurisdiction of a special court-martial is expanded, there will be greater flexibility for plea bargaining. For example, if the convening authority is willing to accept a ceiling of one year's confinement as part of a negotiated guilty plea, it might be feasible for the parties to agree that a case would be referred to a special court, instead of a general court-martial. However, in view of our Court's decisions, which allow some leeway for waiver of pretrial investigation and of other procedural rights, there already is great flexibility in the plea bargaining process.

It is our impression that at present the Navy has a much greater caseload problem than the Air Force; and this circumstance probably induces use of the special court-martial by the Navy in some cases where, if caseload pressures were less, trial by general court might take place. Obviously, expansion of the special court-martial jurisdiction would reduce somewhat the likelihood that an accused will receive too lenient a sentence because his case was referred to a special court-martial -- rather than a general court-martial -- for administrative convenience.

h. Based on the Court's experience, what portion of cases would not be affected by the change in sentencing jurisdiction of the special court-martial.

From our experience we cannot make a meaningful estimate of the portion of cases that would be affected by the change in sentencing jurisdiction of the special court-martial, although we suspect that they would not be as great as some proponents of the proposal seem to believe.

11. Supreme Court Review

a. Would the Court favor a system whereby the accused would not have a right of collateral attack if Supreme Court Review could be sought? If not, why not?

We do not believe that the right of an accused to undertake collateral attack should be cut off simply because certiorari to the Supreme Court is authorized. Indeed, to attempt such a curtailment might be unconstitutional; and collateral attack on convictions in the civil courts is not always precluded even though the defendants are free to seek direct review of their convictions by the Supreme Court. Of course, regardless of the availability of certiorari from our Court to the Supreme Court, we assume that the Article III courts will apply to collateral attacks on court-martial convictions the limitations that would be applied to collateral attacks on state and federal court convictions, so that generally an accused could not assert claims of error not raised on direct review.

b. You point out that "for an accused---but not for the Government---our Court would hold the key allowing access to the Supreme Court." How would you suggest that this inequity be remedied if in fact we go ahead with a certiorari provision?

The most obvious way to remedy the "inequity" would be to allow the accused to petition for certiorari in any case in which he had petitioned for review in our Court -- whether the petition was granted or denied. This obviously has some undesirable caseload implications for the Supreme Court; but we believe that it might be preferable to the alternative now being proposed by the Administration. Of course, the fact that our Court would control access to the Supreme Court might have a distorting effect on our own decisions whether to grant review; and this would be another reason for not restricting the accused's right to seek certiorari.

c. (1) On an average, how many petitions for review has the Court of Military Appeals granted over the last 5 years?

Answer: An average of 280 cases per fiscal year, although over the last 5 years it has fluctuated between 151 and 429.

(2) Based on that average how many cases in each of those years would have been eligible for petitions for certiorari to The Supreme Court?

Answer: Fiscal Year 1981 - 162 cases
Fiscal Year 1980 - 372 cases
Fiscal Year 1979 - 143 cases
Fiscal Year 1978 - 440 cases
Fiscal Year 1977 - 373 cases

The following chart provides the basic data from which the responses to Question 11(c) have been prepared:

	FY 81	FY 80	FY 79	FY 78	FY 77	Total:	Average Per Yr.
(1) Petitions for Grant of Review Filed	2179	1725	1513	1627	2061	9105	1821
(2) Cases Certified by TJAG	9	34	14	9	19	85	17
(3) Petitions Granted	151	337	128	429	354	1399	279.8
(4)Petitions for Extra-ordinary Relief Granted	2	1	1	2	0	6	1.2
(5)Mandatory Review	0	0	0	0	0	0	0
(6) Cases eligible for Petitions for Cert-iorari	162*	372*	143*	440*	373*	1490	298

* Item 6 is the total of items 2 through 5 for each fiscal year.

d. Judge Everett, if the Committee decides to recommend certiorari from certain decisions of the U.S. Court of Military Appeals, would the Court recommend any other changes in your structure or jurisdiction? If so, what would they be?

If the Committee decides to recommend certiorari, it should consider changing our Court into an Article III Court and adopting suitable implementing legislation. Moreover, provision might be made whereby other courts could certify to us legal questions concerning military justice -- just as certification of legal issues is allowed in some states by statute or by rule of court.

12. Discharge Review Board

a. Would the Court agree with a provision which would retain the power of the Discharge Review Boards to grant relief--as a matter of clemency--from bad conduct discharges imposed by special courts-martial?

Our concern has been with the power of statutory boards of laymen, like the Discharge Review Board or the Correction Board, to overrule our decisions on matters of law. So long as it is clear that our Court makes the final determinations of law concerning cases tried by courts-martial, we have no objection to allowing Discharge Review Boards to retain their power to grant relief from bad-conduct discharges imposed by special court-martial. Presumably Congress granted this power to these Boards because of problems that had arisen in trials by special courts-martial during World War II. As pointed out in our answers to earlier questions, special courts-martial still do not have all the safeguards applicable to general courts-martial; and so there may still be some occasion to retain the clemency power of the Discharge Review Board as a safety valve. Also, this power may forestall divergence between the standards applicable to administrative discharges issued because of misconduct and to punitive discharges which may be adjudged by special courts-martial for very similar misconduct.

13. 1981 Amendments to the Code

a. I wonder if the Court would comment on the success of the 1981 Amendments to the Code. Have you seen any cases arising out of changes made in those amendments? What is your reaction in particular to the regulations issued in connection with individual military counsel? Are they too restrictive? Have you heard of instances where, as a result of these regulations, accused have been deprived of a meaningful right to such counsel?

(1) Apparently the 1981 Amendments have been very successful. Since the Amendments took effect less than a year ago, we have reviewed very few, if any, cases arising under those Amendments and involving the regulations concerning individual military counsel. On the other hand, we have seen considerable evidence that involuntary appellate leave -- authorized by the Amendments -- has been a major boon to commanders without significant harm to accused persons.

(2) We are reluctant to comment on the regulations that have been issued concerning individual military

counsel, for at some later time our Court may be confronted with claims by appellants that the regulations were more restrictive than had been contemplated by the enabling legislation.

14. Reasons for Changing the System

a. In the Court's view, what are the soundest reasons for making an adjustment to the military justice system? Should we be making changes for administrative convenience? Should we make changes just to conform the military justice system to our civilian criminal justice system? Should we be attempting to identify and fix specific problems in the system?

(1) The soundest reasons for making adjustments to the military justice system are: to deal with problems that have been revealed by experience; to prepare for contingencies, such as combat operations, that are reasonably foreseeable; to enhance confidence in military justice; to reduce direct and indirect costs of military justice; and to take advantage of modern technology. In our Statement to the Committee we suggested that nine proposed changes might be combined in a bill for immediate adoption; and these changes are justified by the reasons we have mentioned.

(2) We think that it is perfectly appropriate to make statutory changes for administrative convenience. However we suggest the following limitations on such changes: (a) that the proposed change be scrutinized carefully to assure that in the long run it really will promote administrative

convenience; (b) that if the change can be accomplished by Manual provision or departmental regulation, then it be accomplished in this way rather than by statutory change; and (c) that a careful calculation be made of offsetting costs -- such as loss of safeguards for accused servicemembers or diminished confidence in military justice.

(3) The federal and state criminal justice systems provide valuable models for the military justice system to consider; and, in some instances military justice is even required by the Constitution to conform to these models. However, we must be mindful that some aspects of the civilian criminal justice system might not work well in the military environment. For example, we are not sure that -- although sentencing by judge alone is the only form of sentencing allowed in the federal courts and is generally preferred in State courts -- the option should be eliminated for a military accused to be sentenced by court members.

(4) Certainly, we should be attempting to identify and fix specific problems of the system. Accordingly, our Court favors changes like allowing rehearing en banc by Courts of Military Review; use of videotapes in recording trials; authorizing oral requests for bench trials; and allowing government appeals from certain rulings by trial judges. Fortunately, the mechanism is in place, through the

Joint-Service Committee and the Code Committee, to identify specific problems and recommend either Manual revisions or statutory changes to fix the problems.

b. How would the Court characterize overall the proposals before us? In your view do these proposals focus solely on areas where the military justice system is not working, is having problems? What elements of these proposals, in your view, respond to specific problems? What elements do not?

(1) Overall the proposals before the Committee could be characterized as a combination of desirable housekeeping and relatively noncontroversial changes to enhance efficiency and significant alterations in the roles of commanders, military judges, defense counsel, and -- under the Administration proposal -- our Court.

(2) Generally speaking, military justice is working well today. However, in connection with deployments like that in the Indian Ocean, there have been some problems, which call for specific, rather than sweeping, solutions.

(3) The proposal in S.2521 that a punitive article be enacted to deal with drug offenses responds to a specific problem -- a problem to which our Court has adverted in recent opinions. The proposal to videotape records of trial responds to a problem encountered in many systems of justice -- namely, the shortage of trained court reporters. The proposal to allow government appeals responds to the

problem of an imbalance between the appellate rights of the accused and those of the Government; and this is an instance in which military justice should conform to the federal procedure, which allows such appeals. Authorization for rehearings en banc in the Courts of Military Review will rectify a problem -- albeit not a major problem. To alter the responsibilities of the convening authority in post-trial review responds to a specific problem -- namely, that the current requirements for post-trial reviews are unnecessarily onerous and cumbersome; but the change in the role of the commander and the elimination of the "written opinion" of the staff judge advocate may represent an overreaction to the problem. With respect to the proposals for expansion of the jurisdiction of the special court; transfer of all sentencing power to the military judge; and creation of certiorari jurisdiction in the Supreme Court, we have not yet seen enough evidence to demonstrate to us what is the specific problem or how it should be solved.

15. Impact on the Rights of the Accused

a. Judge Everett, how would you characterize the impact of the proposals now before the Subcommittee on the rights of the accused in the military justice system? Are those rights enhanced overall? Are they generally left at about the same level of protection? Are they diluted? Judge Cook? Judge Fletcher?

b. If you believe the rights of an accused are diluted, please explain in what areas and why you feel those changes should (or should not) be made.

Answer of Judge Everett:

(1) There is no question that the proposals before the Committee diminish rights of accused persons in the military justice system. As to sentencing by judge alone, the accused loses an option which presently he enjoys. By expansion of the jurisdiction of the special court, he becomes subject to twice the period of confinement pursuant to the sentence of a court-martial which lacks some of the procedural safeguards that characterize a general court-martial. The extent of appellate review in the field would be curtailed; and an accused would forfeit valuable appellate rights by his inaction or by that of his defense counsel. The only question is whether the gains to be recognized by the Armed Services are commensurate with the dilution of these rights.

(2) On the evidence now before me -- but subject to changing my mind on the basis of information that may later be furnished -- I would make whatever changes in the Code, if any, are necessary to eliminate some of the cumbersome requirements now applicable to the staff judge advocate's review. Also, I would allow appeals by the government; authorize withdrawal of an appeal or waiver of appellate rights, including the right to a

verbatim record of trial; and adopt the rest of the nine proposals listed near the end of our Statement to the Committee. With respect to sentencing I either would leave things as they are for the moment, pending further study, or would adopt the American Bar Association proposals, whereunder an accused could waive trial by jury as to both findings and sentence or as to sentence alone. I believe that the special court-martial jurisdiction should be left as it is, until a detailed cost-benefit study has been completed. Likewise, I would be very cautious about proposals for certiorari, until the full implications have been thoroughly examined and the Supreme Court consulted. Moreover, if adopted, the proposal should not include the limitation contained in the Administration proposal, whereunder for an accused a grant of review by our Court is required for access to the Supreme Court.

Answer Judge Cook:

In general, I concur with the remarks of Chief Judge Everett. It would appear that the rights of the accused would not be enhanced overall by the proposed legislation. Except to the extent that an accused might benefit by more expeditious processing of his discharge by waiving his appellate rights and rights to a verbatim record, the changes largely benefit the Government. In this particular area, I would require an express waiver of such rights and an indication of adequate advisement of rights by his counsel which would become a part of whatever record was produced (i.e., court-martial order, summarized record, etc.).

Answer of Judge Fletcher:

I believe criminal matters should be handled in an expedited manner with finality being certain, both of these premises enuring to the benefit of the defendant and the government. I conclude that if there is any possible dilution of accuseds' rights in the matters before the Committee, they are in balance with the objectives of expeditiousness and finality found in the two proposed pieces of legislation. I prefer to not answer the question of dilution of the accuseds' rights, but to look at the justice system as a whole. In this respect, I find that with rare exception the proposals set forth in the matters under discussion would provide for a better system of justice, placing as its paramount purpose, not the question of protection of the accused, but the maintenance of an ordered military society.

I believe the above statements are consistent with the proposed petition for certiorari to the Supreme Court of the United States, in that both expedited justice and finality would be obtained more efficiently than through the now-collateral method of petitioning to that court.

16. Independence of Judges in the Military

a. Is the Court satisfied with the independence of military judges? Are they sufficiently sheltered from any potential for command influence?

We are impressed with the integrity and independence of military judges. We would suggest, however, that the standard tour of duty as a trial judge or appellate judge should be for a minimum of three years, unless the judge himself specifically consents to be reassigned to some other position or unless he is removed from his duties because of physical disability or, after some type of hearing, for neglect of his duties.

Senator JEPSEN. Mr. Hunter and Mr. Fremont, you may proceed.

Mr. HUNTER. I will defer to Mr. Fremont.

STATEMENT OF ERNEST H. FREMONT, JR., ESQ., CHAIRMAN OF THE STANDING COMMITTEE ON MILITARY LAW AND F. DORÉ HUNTER, ESQ., CHAIRMAN, SPECIAL COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL

Mr. FREMONT. Mr. Chairman, it is a great honor for me to be here.

I have been given this assignment just recently. I have been on the board of the ABA and worked as a liaison to the Military Law Committee for 2 years and as a reward for that I was given the chairmanship of the Military Law Committee which, you understanding politics, I am happy to serve.

It's a great assignment. I have served in both the Navy and the Army and was assigned to the courts-martial unit during the war and watched 1,600 general courts each year. I know what the code has done to the system and I know what you are doing is a great thing to improve the code.

I come not armed with great knowledge of the code, but I come loaded with great enthusiasm. As the new chairman I have been given the responsibility of advising the honorable chairman what the ABA's position is on some of these issues.

The ABA has had many stands and you have incorporated them, or the code has already incorporated them from the past, but at this time I have five or six very short matters to discuss, one of which is that we are pleased with the 15-year tenure for the judges.

I come from Missouri, your neighboring State, and I have been president of our State bar and I have worked with judicial reform and started the last judicial reform in our State which has come to conclusion in recent years. I believe we should have a strong court and I believe we should have a very good retirement program for judges.

I was appalled at the fact that these judges are not considered Federal judges when I first discovered that. There should be a much better and much stronger retirement program for these judges. They are no less a judge. They are dealing with individual rights just as a circuit court of appeals judge is from Iowa or Missouri. I feel very strongly about that. They should be treated much like an article 1 court, like, say the tax court. They should be given a much greater consideration.

The second issue is relating to the certiorari that Judge Everett mentioned. The ABA has a position that there should be the right of certiorari to the Supreme Court. As I was talking to some learned gentlemen last night because of my lack of experience in the appellate procedure in terms of detail, I asked how many times would a certiorari be granted, and they said it would be very, very rare that it would be granted and that the need would not be there, but the right would be there.

I think, Senator, that is probably as important as whether it is exercised or not. It is there and they do not have to go to the circuitous effort of going through the Federal system which you can ultimately do. I understand there have only been four capital cases since 1959. So I don't think the use would be great.

The next issue that I would like to discuss with the committee is the right of appeal by the Government. I think the Government should have the right of appeal. As a practicing attorney, if a confession is kept out of the case there should be some consideration and reconsideration for the Government because this could end it there. If you don't have the confession to consider or it is not ruled out by a higher authority, then you are going to end up with a system that is going to let a lot of people off that should not be let off. I do think that there should be a right to an appeal and I think it would be a very healthy thing for the Government.

The peremptory challenge. The ABA thinks there should be two. They don't agree with the three, Mr. Chairman. I have talked with the people involved with the system and it does become very cumbersome and there is a grave concern that small posts where you do not have a large staff and you might need as many as 15 to 18 people to serve as a panel, and if you are each going to have 3 challenges it would be a very burdensome thing from the personnel standpoint. Two should satisfy the requirement, and I think that the ABA is strong on that position.

The association has taken a position with regard to the request for the judge to serve as judge rather than having a whole panel. They believe that there should be a right to either orally, or make it in writing, to ask for a judge trial, and that is a position of the ABA. I can see where they should have a right to do that. It would certainly simplify some cases and hurry along some of the matters.

The en banc consideration. As I understand it, you can have an opinion by the Court of Military Review of the Navy and the Court of Military Review of the Army and you end up with a long period of time before a decision and they are sort of going down two different channels. The right to have en banc review of the issue would shorten the time, would make it simpler, and would probably give a clear and concise record for an appeal, and I think that is very important.

Judge Everett discussed the issue about whether the judge should advise the accused if he has been accused and convicted of his right to appeal. In 1974 there was a policy of the ABA that did require that, and I can see that it does not harm. I can't see how it would add a great deal of burden to the court. I think that the rights should be protected and nothing should be waived and the defense counsel, whether he is adequate or inadequate, shouldn't be the dependency. I think the court has the obligation probably to do so and that has been the ABA policy in the past.

As far as videotape, I have worked with it all the time as a trial lawyer. This week I spent the whole day on Monday taking depositions under videotape and I think it is a great instrument. I think that should be used widely. I have some hesitation personally being a trial lawyer of having it in the courtroom and this has been debated for years in the House of Delegates. The ABA says it is all right to go ahead and do this, but this is something that the honorable chairman will have to consider. I do think that videotape is here, its time has come and it should be used to save money.

I understand that people have to travel all over the world at this point in time to testify and spend most of their time doing that. I think the time of those people could be cut down by a videotape of their testimony by either having the lawyers come to take his deposition or to have someone at that particular post take it, and I think that would be very money saving.

In the written statement it states that we have no opinion on article 112(a). We don't have an opinion at this time, but we certainly will have a position. That is one of the things I want to take up at our next meeting which is going to be held in New London in October. I had not seen your bill until just recently. I want to take that up at length at our meeting and if we can be of any help or service to you, Mr. Chairman. I look at this assignment as a great honor because it is a very important thing for the military to be looked at by a civilian entity and I think this is the civilian entity that must do it.

I am pleased to be able to appear before you.

Thank you very much.

Senator **Jepsen**. Mr. Hunter?

Mr. **Hunter**. Mr. Chairman, I am Doré Hunter from Boston. I am the chairman of the American Bar Association's Committee on Legal Assistance for Military Personnel, a subject with which I have had long contact, both as the chief legal assistance officer of two major Coast Guard commands during my career on active duty and my tenure on this committee which is now in excess of 4 years.

In addition, I have had the somewhat unusual perspective because of the way the Coast Guard is organized of also being a major unit commander in a remote location where I was on the other side of the fence, so to speak, and could see the benefits and the needs of legal assistance from a unit commander's point of view.

We are absolutely delighted the committee can hear us today and we urge you to consider adopting the provisions in Senator Thurmond's bill, S. 1590 as an amendment to S. 2521. We think it would be extraordinarily appropriate for the provision of a statutory basis for legal assistance to service personnel to be tied to and part of an amendment to our ever-evolving Uniform Code of Military Justice.

It is a truism within any organization and it certainly is true within the Armed Forces that those small numbers of men and women with whom the organizations are having some problem, and in the case of military justice those who may be accused of some crime or defalcation, are those upon which the organization exerts considerable attention, time and expense, and I think that is reflected in the extensive provisions in the code.

At the same time, it is extremely important, and perhaps even more important, to attempt to prevent disciplinary problems before they happen and to attempt to take care of the services' own. Legal assistance is an activity that is uniquely directed in that direction. The very fact that without any statutory authorization legal assistance programs have operated under secretarial and departmental regulations since the Second World War is evidence enough of its need.

Let me take a moment, Mr. Chairman, just to touch briefly on what military legal assistance is. It is mainly office advice provided by either military attorneys or civilian attorneys employed by the military department to servicemen or women or their dependents.

It mainly involves office advice, in-office advice and generally will include such matters as landlord-tenant problems, consumerism, contracts of sale and so forth, simply powers of attorney for a serviceman who is going to be distant, a simple will for a serviceman for obvious reasons, the Soldiers and Sailors Civil Relief Act matters, advice and assistance on tax responsibilities and problems, family problems, personnel real estate transactions like the purchase of a domicile, small claims matters, and sometimes minor civil misdemeanor questions.

The American Bar Association Committee, of which I have the honor to be the Chair, has been intimately involved in legal assistance ever since the Second World War. The American Bar at that time entered into a cooperative project with the military departments and actually helped provide legal manpower at one point for the program.

I think that the findings of this committee, which meets three times a year every year at military posts around the country in fact-gathering mode, is without question 100 percent to the effect that the provision of an effective military legal assistance program reduces disciplinary problems and provides additional effective manpower to the unit commanders.

It relieves the mind of the sailor, soldier, airman and airwoman who might have, for instance, an automobile, that won't run and makes that individual an effective mechanic on the flightline or sailor on the ship while that problem is being dealt with and is particularly prophylactic in regard to absence offenses or potential absence offenses.

The deficiencies in the program as it exists among all the Armed Forces at the moment is very simply the one we are here to address today, Mr. Chairman, that there is no statutory basis for it. Now the difficulty with that is that any resource manager must balance priorities and the military resource managers, when they go to balance their priorities, have a great number of statutory responsibilities which they must fulfill.

So by definition over the years military legal assistance has been an excess or a space available type of service. The fact that uniformly over the years the military services and departments have found legal assistance to be of sufficient importance that they have managed to get it to table to share in the resource I think, as I said before, is evidence of its importance.

If this committee and this Congress in its wisdom would decide to grant a statutory basis to military legal assistance, then it does not have to take a back seat purely because of what is or is not in the statute books and may be considered on its merits.

I think also there is to some degree an attitudinal problem. Legal assistance is largely rendered by young military attorneys who have not long been in the Armed Forces, and always of course under the supervision of their seniors, and they as students of the statutes, are keenly aware that this is only a program based on regulation, and therefore, I think in some instances, and I hope isolated instances, it leads to some feeling that this is a less important activity than military justice, claims, or whatever.

Senator **Jepsen**. I believe that your proposal for statutory recognition and authorization for military legal assistance programs should be carefully considered by this committee. Does your proposal envision entitlement to all active duty service members and dependents, or do you visualize it as being discretionary for the Secretary of Defense?

Mr. HUNTER. Mr. Chairman, we envision this proposal, if enacted into law, as requiring that there be some level of legal assistance, but that the scope and direction be peculiarly directed by the military department. In that regard I would hold up to your attention one sentence from a letter of December 31, 1980, of R. D. Tice, the Deputy Assistant Secretary of Military Personnel Policy, to Senator Stennis commenting on the predecessor to this particular bill, and I quote:

> All that would be required, as a practical matter should some statutory recognition be obtained, would be a continuation of some form of legal assistance program as determined by the Secretaries and the military departments.

We do not envision any distinguishment of the current regulation based program, but we would feel much more secure if there was a statutory basis, and I think it is entirely possible that one can't predict whether the military departments would return to the Congress having a statutory basis and argue for more resources, but there is certainly nothing encompassed within this bill, Mr. Chairman, which would require that in any way.

What we are trying to achieve and urge Congress to adopt is a statutory authorization of what is currently being done. Therefore, we see this as a no-cost proposal. Indeed, in the last Congress where the legislation, unfortunately, did not get to hearing, to my understanding, both the Office of Management and Budget and the Congressional Budget Office agreed with that assessment. It is not our intention to be expansionistic. It is our intention to provide some level at the discretion of the military departments.

Further, Mr. Chairman, in regard to the admonition to attempt to be brief, we have submitted written testimony. I did have the privilege earlier this year to submit a very long and detailed position paper to your staff of which I would be happy to provide additional copies, if you will.

However, in closing I would like to change hats, if I may. I am here as the Chairman of the American Bar Association Committee. I have the privilege also to be a member of the Federal Bar Association and I am pleased to advise the committee that last Saturday, I believe September 11, the Federal Bar Association at its annual convention overwhelmingly adopted a resolution to support the language of S. 1590, which we are urging you to adopt as an amendment, and authorized me to convey the FBA's sentiments in that regard to this committee.

Thank you.

[The prepared statement of Ernest Fremont and F. Doré Hunter follows:]

PREPARED STATEMENT OF ERNEST H. FREMONT, CHAIRMAN, STANDING COMMITTEE ON MILITARY LAW, AND F. DORÉ HUNTER, CHAIRMAN, STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

I am Ernest H. Fremont, Jr., from Kansas City, Missouri and I am Chairman of the American Bar Association's Standing Committee on Military Law. I am an immediate past member of the Association's Board of Governors in which capacity I was liaison to the committee which I now chair. I am pleased to present this statement jointly with F. Doré Hunter, from Boston, Massachusetts, who is the Chairman of the Association's Standing Committee on Legal Assistance for Military Personnel. Mr. Hunter practices law in Boston, Massachusetts, prior to which he was a United States Coast Guard officer; he has served as the Chief Legal Officer for a major United States Coast Guard command and was a Special Court Martial Military Judge as well as the Staff Judge Advocate for a United States Coast Guard General Court Martial Convening Authority.

We are particularly pleased to represent the Association today and wish to thank you, Mr. Chairman, for extending an opportunity to the American Bar Association to participate in these important series of hearings on proposed amendments to the Uniform Code of Military Justice. As you can imagine, hundreds of different sections and committees within the Association devote enormous amounts of time and effort to studying and proposing improvements in substantive civil and criminal laws, judicial and regulatory procedures and proposed improvements in the manner in which attorneys render legal services to the public - all in the civilian area. Although the committees we chair, and other entities within the organization, spend great amounts of effort concerning military laws and procedures, there is always a continuing need to improve the rendering of legal services within the military.

We view these hearings as an opportunity to bring the expertise of the organized bar, a primarily civilian bar, to the refinement of the Uniform Code of Military Justice, and related laws. The Association has a long history of interest and involvement in reviewing and recommending changes in the military justice system. It is an essential element of the defense of our nation, at home and abroad, in peace and in war. Military justice is the framework for maintaining military discipline while, at the same time, enforcing that discipline in a manner consistent with the basic legal rights and obligations of all citizens. It is, Mr. Chairman, a continuing and difficult task to balance the often competing interests of the maintenance of military discipline and the protection of an individual's rights.

We view your legislation, in large measure, as part of this continuing effort to fine tune the military justice system and, in cases where those delicately balanced competing interests of which I spoke become imbalanced, to provide a statutory correction.

Neither the American Bar Association nor either of our committees has formally considered S. 2521, your proposed Military Justice Act of 1982. However, in recent years the Association's policy-making House of Delegates has adopted a number of recommendations for amending various Articles of the Uniform Code of Military Justice, many of which we are pleased to see incorporated in the text of S. 2521. As will be indicated below, there are some other provisions which the Association cannot support, or to which we would recommend amendments, and yet other provisions on which the Association has no policy.

The Court of Military Appeals is the pinnacle of the military legal system. In order to adequately carry out its responsibilities, it must have a full complement of judges, and those judges must each have a full 15 year tenure. In recent years, there has been a great turnover on the Court and there have been long periods when there were only two judges. The Association supports the provisions of S. 2521 that establish full fifteen year terms for all judges appointed to the Court. Furthermore, we strongly endorse placing the retirement of Court judges on an equal footing to that of Article I courts. The decisional independence afforded by a full fifteen year term and the financial independence resulting from a more equitable retirement system will help assure continued outstanding appointments to the court.

We urge that the provisions in S. 2521 be amended to establish appellate jurisdiction in the United States Supreme Court to review decisions of the Court of Military Appeals upon writ of certiorari. While it is exceedingly unlikely that the Supreme Court of the United States would grant many writs of certiorari to the Court of Military Appeals, we have been persuaded that creation of this jurisdiction is a desirable improvement both for service members and for the government. Consequently, we would support the recommendation of the Department of Defense to provide such jurisdiction.

The ABA also supports the provisions in S.2521 that authorize a limited right of appeal by the government from certain rulings by a military judge which do not constitute determinations of fact concerning an accused's innocence. However, we oppose authorizing the convening authority to return to the military judge the record of a trial for reconsideration of legal rulings. Consequently, we would recommend that an appropriate amendment to Article 62 (b) be included in S. 2521 to clarify this point.

A significant proposal in S. 2521, with which the ABA is in partial agreement, concerns the number of peremptory challenges allowed. The Association recommends an increase in the number of such challenges in a general court martial both for the government and for the defense. We oppose an increase to three peremptory challenges for both sides as proposed in S. 2521. While we believe a case has been persuasively made to double the challenges permitted by both sides, we feel that to triple such challenges for each side would impose an unnecessary administrative burden on the services, where we suspect the new increase would fast become the rule and not the exception. In all general courts martial which require a minimum of five members, we believe that an increase to three peremptory challenges for each side - when avoidable absences are taken into consideration - would necessitate the appointment of at least fifteen members, all of whom would necessarily be absent from their assigned military duties. Particularly for the air and sea services, this burden is too great. In a related provision in S. 2521, we support the proposed change from current law to permit a request for trial by military judge alone to be made either orally or in writing.

We are also pleased to support the provision included in S. 2521 and endorsed by the Department of Defense to allow rehearings en banc by the Courts of Military Review. Such rehearings would expedite the resolution of conflicts among panels in the military justice system and would promote finality of Court of Review decisions within the respective systems.

The ABA also favors two other, unrelated, improvements not included in S. 2521. Currently, the military lawyer must advise the accused of his rights to appeal and to petition for clemency. We would recommend an amendment requiring the court-martial to so inform the accused after sentence. We also favor amending the Code to permit the use of videotaped depositions and in exceptional cases, videotaped records of trial.

Finally, our committees and the Association express no view on whether a judge alone should be permitted to impose sentences, nor do we have an opinion concerning the inclusion of proposed new Article 112 (a), which enumerates certain crimes and sentences involving controlled substances.

Finally, Mr. Chairman, we would urge the inclusion in S. 2521 of an amendment to Chapter 53 of Title 10, United States Code, to provide a statutory basis for existing military legal assistance. The specific proposal we endorse has been introduced by Senator Thurmond as separate legislation, S. 1590, a copy of which is attached. The American Bar Association urges this amendment of S. 2521 to statutorily recognize an important, existing element of military legal practice.

Military legal assistance programs exist because adequate civilian legal services generally are not available to military personnel stationed overseas, deployed at sea, or serving at remote installations. Requiring military personnel to travel long distances from their duty stations to consult with civilian attorneys results in many lost hours of military service. Even where civilian attorneys are available to military personnel and their dependents, considerable savings may be realized by providing legal services, at the command where the service member is serving. An on-site approach to providing legal services contributes to the accomplishment of the primary objectives of the armed forces - military readiness.

Unresolved personal problems can adversely affect morale and efficiency and frequently result in behavior requiring disciplinary action. Through effective preventive law efforts, legal assistance programs enable military people to avoid problems before they occur. Where legal problems cannot be avoided, prompt aid in resolving these problems is necessary to enhance performance of duties. Accordingly, it has been the policy of the services, through legal assistance programs, to make personnel aware of their legal rights and obligations and to provide a means whereby these problems can be resolved, if possible, before disciplinary action is needed.

The purpose of Senator Thurmond's proposal is simply to provide statutory recognition and authorization for the military legal assistance programs. Until such legislation is adopted, the legal assistance programs are operated solely under military service directives. As a result, the military services are unable to request specific budgetary authorizations and must continually use legal assistance as the "excess" legal service to be provided only after the statutorily required services relating to military discipline and other matters are performed.

The American Bar Association recognizes, and Senator Thurmond's bill reflects, that the military services must have flexibility to increase their effort in one area and decrease it in other areas where the needs of the service and the nation demand. The legislation will not alter this concept, but will insure that legal assistance will be duly considered along with other statutory responsiblities.

Mr. Chairman, we appreciate this opportunity to present the Association's recommendations to improve military law and practice and will be pleased to respond to your questions.

97TH CONGRESS
1ST SESSION

S. 1590

To amend title 10, United States Code, to provide for legal assistance to members of the Armed Forces and their dependents, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JULY 8), 1981

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on Armed Services

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A BILL

To amend title 10, United States Code, to provide for legal assistance to members of the Armed Forces and their dependents, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the intent of the Congress that Armed Forces personnel have legal assistance made available to them in connection with their personal legal affairs.

SEC. 2. (a) Chapter 53 of title 10, United States Code, is amended by adding at the end of such chapter the following new section:

"§ 1041. Legal assistance

"(a) Under such regulations as may be prescribed by the Secretary concerned, members of the armed forces on active duty shall be provided legal assistance in connection with their personal affairs and, subject to the availability of resources, legal assistance may be provided to dependents of active duty members and to members entitled to retired or retainer pay, or equivalent pay, and their dependents.

"(b) The Judge Advocate Generals, as defined in section 801(1) of this title, are responsible for the establishment and supervision of legal assistance programs under such regulations as may be prescribed by the Secretary concerned.

"(c) Nothing contained in this section shall be construed as authority for the representation in court of armed forces personnel or their dependents who can otherwise afford legal fees for such representation without undue hardship.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1041. Legal assistance.".

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Senator **Jepsen**. Mr. Fremont and Mr. Hunter, I have no further questions for you. We may have some for the record.

I thank you very much for your interesting and enthusiastic presentation.

Mr. **Hunter**. Thank you.

Mr. **Fremont**. Thank you.

Senator **Jepsen**. Mr. Fidell, you may proceed.

Again, I remind the witnesses that your full written testimony will be entered into the record as if read and you are certainly welcome to proceed in any manner you so desire.

STATEMENT OF EUGENE R. FIDELL, ESQ., AMERICAN CIVIL LIBERTIES UNION

Mr. **Fidell**. Good morning, Mr. Chairman.

My name is Eugene Fidell. I am a partner in the firm of LeBoeuf, Lamb, Leiby & MacRae and a cooperating attorney for the American Civil Liberties Union. I had hoped to be accompanied this morning by David E. Landau of the Washington office of the ACLU. Unfortunately, Mr. Landau was unable to remain for this portion of the hearing.

Let me say that we greatly appreciate the opportunity to testify.

Our testimony presents comments on a variety of points, and, taking your admonition to heart, I will not repeat them.

I would like to make a few observations that I believe are worth hearing live, if you will, as opposed to merely on the written record.

SUPREME COURT REVIEW

In our view, the highest priority should be afforded the matter of Supreme Court review of decisions of courts-martial. This is a matter that has been debated quite a bit. There are extensive comments in the testimony that was presented by the judges this morning. Other commentators have spoken to it. The American Bar Association has long been on record as favoring it. It is our position that the time has come, indeed it is long past due, for extending the Supreme Court's certiorari jurisdiction.

I would like to speak, if I may, to some of the objections that have been raised.

First, the objection has been made that it is simply not necessary to have direct review on writ of certiorari because habeas corpus relief is available in the Federal District Courts and up through the Courts of Appeals. With the greatest respect for those who take this view, I would submit that that is an inadequate answer.

Recently a similar argument was made before the Supreme Court in the case of *Territory of Guam* v. *Olsen*. In that case the Guam Legislature had adjusted judicial procedures to preclude review in the Ninth Circuit Court of Appeals of certain decisions of the Guam courts. The statute of the Guam Legislature was attacked and the argument was advanced that it didn't matter if you couldn't go to the highest court of Guam, a court that exists under article 1 of the Constitution, like the Court of Military Appeals, because you could always go to the Federal District Court in Honolulu or wherever and obtain relief.

The Supreme Court dismissed this contention saying that the availability of habeas corpus relief was not an adequate substitute for direct review. I think this is a very telling precedent that bears directly on the issues before this committee.

My testimony points out that some of our sister common law countries, people with whom we share important legal and cultural traditions, have tended to permit their highest courts to review courts-martial appeals directly. The House of Lords, which is the highest court of England, has such a procedure, the Supreme Court of Canada has such a procedure, and the High Court, which is the highest court in Australia, has such a procedure.

I cannot claim to be privy to detailed statistics, but I can tell you tthat I understand that none of those high courts have been overburdened by the workload engendered by direct review of decisions of their military appeal courts.

Each of these countries, by the way, quite interestingly, has a courts-martial appeal court not unlike the Court of Military Appeals. So we are dealing with a very close analogy and in each case we are dealing with a discretionary jurisdiction just like the discretionary certiorari jurisdiction of the Supreme Court.

My understanding is that in the years since the Canadian arrangements have been in place a grand total of one military case has been taken by the Canadian Supreme Court. It is an interesting case, not unlike the *O'Callahan* case that the Supreme Court decided some years ago involving the scope of military jurisdiction. Another case may be on its way up, but I wouldn't exactly call this an avalanche of cases.

Our society is somewhat more litigious, I am sure, than the English, Canadian, or Australian societies, but there are ample protections to insure that our Supreme Court is not going to find itself reading just military cases.

Let me turn to some of the other specific arguments against certiorari and see if I can comment on them.

The first argument that has been advanced—and was mentioned last week by General Clausen—was that certiorari jurisdiction would involve the incurment of additional costs. I would submit that this is an insubstantial objection. The costs incurred are essentially printing costs and attorney time costs and these are part and parcel of any Federal legal action. There is nothing special about the costs that would be involved here. I submit that they would be very minor indeed.

The suggestion has been made that there will be a burden on the Solicitor General's Office. That the Solicitor General is involved in Government appeals is obviously the case, but in point of fact in many cases the Solicitor General's Office does not even respond to certiorari petitions that are on their face plainly insubstantial.

When one slips by and the Supreme Court believes, as I understand the practice, that a cert petition ought to be answered, and the Solicitor General's Office has not filed a response, the Court may suggest that the Solicitor General's Office respond.

As far as the delay factor is concerned, certainly there is far greater delay in having collateral attack upon a courts-martial conviction through the Federal district court and the court of appeals than there is in going directly up to the Supreme Court.

I would like to turn, if I may, to some of the other comments that have been made.

JURY SENTENCING

With respect to jury sentencing, the position that is taken in our testimony, Mr. Chairman, is that jury sentencing should be retained. There is a slight modification that could be considered, and that is to permit jury sentencing at the option of the accused where the guilt or innocence question has been determined by a jury, so that the accused might still have the option of seeking sentencing by judge alone.

As pointed out in our testimony, there are reasons for a difference in procedure between the military and civilian systems and they are cogent in our view. In any event, many people in uniform, and who have been in uniform, have the sense that jury sentencing can be an important safeguard. We are very loath to suggest that that procedure be discarded.

INCREASED SENTENCING POWER OF SPECIAL COURTS-MARTIAL

With regard to the sentencing power of special courts-martial, which is addressed in your bill, Mr. Chairman, as well as the Department's proposal, we have a concern about any procedure that would permit individuals to be imprisoned for up to 1 year based on the vote of three jurors. That, as we understand it, is the consequence of the proposal that has been made and we believe that three jurors should not be entitled to send anybody to prison for 1 year.

Mr. PRINCIPI. What would be an appropriate number, Mr. Fidell?

Mr. FIDELL. Excuse me?

Mr. PRINCIPI. What would be an appropriate number of jurors to send an accused or convicted to prison for 1 year?

Mr. FIDELL. Certainly at least five, which is the present statutory requirement for a general courts-martial.

Mr. PRINCIPI. Why is it OK then in the civilian sector for one person, the judge, to send an individual to prison for 1 year or more?

Mr. FIDELL. To respond to that you would have to consider whether there is a substantial difference in the overall architecture of the military justice system. Some of the differences have been pointed out. I think, counsel, your comment points up the interaction between the maximum sentence part of this proposal and the sentencing power part of the proposal, that is who should do the sentencing and what should be the maximum.

Part of the concern that we have relates to just the sheer size of a jury of three laymen doing sentencing. With regard to sentencing by a judge, we would point out that in the military, unlike the civilian community, as was pointed out recently in a decision of the Court of Military Appeals, sentences run from zero to the authorized maximum, whereas in the civilian community there is a permissible range that is much more narrowly defined. I could go down the list of the reasons for a difference in the system.

If your question relates to how I distinguish between three and five, I am reminded of that famous statement by Justice Stewart in *Jacobellis* v. *Ohio* about obscenity, where he says "I can't define it, but I know it when I see it." Ultimately this resolves into that kind of issue. I personally have a feeling—and I think the feeling of many people would be—that a jury of three is just too small for a major sentence like that.

Mr. Principi. But the percentage would be better with three. It would require two in the affirmative to sentence if you had a panel of three. If you had a panel of five would it require four or three? Would it require three out of five?

Mr. Fidell. It would depend on how you wrote the sentencing requirement.

Mr. Principi. Under current practice with a jury of five?

Mr. Fidell. You would need four votes, as I understand it.

GOVERNMENT APPEALS

Some suggestion was made, in fact both bills suggest a procedure for appeals by the Government. This is permitted in the Federal district courts and obviously some mechanism like this is appropriate. We do have concerns that are pointed out in our testimony with regard to the possibility that an appeal, for example, might be frivolous, in which event any delay should be charged to the Government for purposes of the right to a speedy trial.

In addition, we have a concern that S. 2521 precludes further review in the court of military appeals on such appeals. We think if it is urgent enough for the Government to take an appeal to the court of military review, then in all fairness there ought to be a corollary right to take it up to the highest court of the jurisdiction, if you will, the court of military appeals.

REVIEWS UNDER ARTICLE 69

We have made a suggestion concerning reviews under aritcle 69, which are sort of hidden reviews. They are not reviews by any court, and indeed they represent the great bulk of the court-martial caseload. Those cases are not reviewed by a court of military review or the court of military appeals. Such reviews ought to be performed by officers who have been certified as military judges, not necessarily general courts-martial judges, but persons who have been certified as qualified professionally and personally to exercise judicial functions. Otherwise, you have nonjudges reviewing the work of judges in practical effect.

CHANGES IN ARTICLE 67

We have also suggested certain changes with regard to the court of military appeals, its jurisdiction, the political balance requirement and matters relating to the chief judgeship with respect to which I think no further comment is necessary.

DRUG CASES

There have been proposals regarding amendment of the code concerning drugs. I remember testimony and a colloquy that you had, Mr. Chairman, with one of the witnesses last week regarding the timing of the preparation of the proposed change to the Manual for Courts-Martial and the introduction of your own measure.

I don't want to talk about what ought to be in a drug measure at this time, but I do want to talk about who ought to define crimes. In our view the definition of crimes ought to be and is a congressional function. Now there can be a partnership and the principal elements of a punitive article can and should be spelled out, if the need is there, by the Congress, and arrangements can be made, if needed, for greater specificity or flexibility, if that is what is involved, through executive regulation. But if a punitive article is really what is at stake here, that is Congress' job.

Finally, and I would like to broaden the scope of these comments, if I may. In doing this, Mr. Chairman, I am thinking of the comment that you made in introducing S. 2521, that this is a good opportunity to take a little broader look at the entire system. Let me impose on you in one respect and make such a suggestion.

REVISION OF THE MANUAL FOR COURTS-MARTIAL

There is upcoming a comprehensive revision of the Manual for Courts-Martial. The commitment has been made by the Department of Defense to permit an opportunity for public comment and participation in the promulgation of that, and that is a commitment that we applaud and it is an excellent development.

As a corollary to that, however, I would like to suggest that this is going to be—when it happens, whether in 1983 or in 1984—an important opportunity for this committee to exercise its critical oversight functions. Much military law appears in the Manual for Courts-Martial and is spelled out and articulated in the process of issuing the Manual for Courts-Martial. It is as important a function, if not more important, as that performed by the military courts.

I would suggest that if the committee's schedule and workload can accommodate it, a hearing or other appropriate measures, and I actually would recommend a hearing, ought to be conducted to explore the thrust and, as appropriate, the details of the changes that will be found in the next revision of the Manual for Courts-Martial. The same thing applies with respect to any other changes, such as, if in fact there is going to be a change, the one relating to drug offenses.

I thank you very kindly for your courtesy, sir. I would be happy to answer any questions you have.

[The prepared statement of Eugene R. Fidell follows:]

PREPARED STATEMENT OF EUGENE R. FIDELL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

Mr. Chairman and Members of the Subcommittee:

My name is Eugene R. Fidell. I am appearing today on behalf of the American Civil Liberties Union concerning proposed changes to the Uniform Code of Military Justice. With me is David E. Landau, of the ACLU's Washington Office. My testimony today will address both S. 2521, introduced by the Chairman, and the Department of Defense's proposed "Military Justice Amendments of 1982."

Mr. Chairman, I would like to cover the following areas: sentencing, pretrial and post-trial advice, and review of courts-martial in the offices of the Judge Advocates General, the Courts of Military Review, the Court of Military Appeals, and the Supreme Court. Some of these comments arise from S. 2521, some from the Department of Defense bill, and some from neither. In keeping with your observation that "the time has come for the Congress to review the overall operation of the system,"[1] several of these comments look beyond the four corners of the pending proposals.

Supreme Court Review

The ACLU strongly supports the extension of the Supreme Court's certiorari jurisdiction to cases arising in the military. Such a provision appears in the Department's bill, and we are confident that the Department has fully stated the important reasons requiring such a measure. The House of Representatives approved such a change in 1980;[2] the Senate should follow suit.

A.

The desirability of extending the certiorari jurisdiction to military cases is, as a matter of principle, beyond question. A person convicted of a serious offense in a court-martial should have the same opportunity to have his case heard on direct review in the Supreme Court as a person convicted of an analogous crime in a

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[1] 128 Cong. Rec. S4998 (daily ed. May 12, 1982) (remarks of Sen. Jepsen).

[2] H.R. 8188, 96th Cong., 2d Sess. (1980), passed, 126 Cong. Rec. H10340-42 (daily ed. Oct. 2, 1980).

United States district court. Indeed, it is easier for a state defendant to obtain Supreme Court review than it is for a military accused to do so, since the state defendant need not invoke the habeas corpus remedy in order to obtain such review. The present arrangements make military justice the stepchild of American criminal law. The lack of Supreme Court review was perhaps to be expected when the Uniform Code of Military Justice was new and untried, but to permit this condition to survive after more than thirty years of experience under the Code and the Court of Military Appeals can in no way be excused. Congress should remedy this omission without further delay. Military personnel are not second-class citizens, and should not be treated as such.

Military appeals often involve serious crimes and equally serious questions of federal law, both statutory and constitutional. Only the Supreme Court can resolve the conflicts that arise between decisions of the military courts and decisions of the Article III courts in cases dealing with military issues. Military cases "often present issues of great consequence, and may raise identical issues as to the constitutional rights of an accused as a case within the state or civil federal systems."[3] Presumably it is these generic issues that will prompt a grant of certiorari, and not the relatively arcane areas of practice and procedure where military law doctrines are more likely to be sui generis. Of course, to the extent that the Military Rules of Evidence closely parallel the Federal Rules of Evidence, the chances of a "cert-worthy" evidentiary issue arising in the military would be roughly the same as in the Article III courts.

Despite historic ties, American military justice has in recent times developed without substantial attention to the experience of other common law countries. I would suggest that we can learn from that experience in this area.[4] My research indicates that in the United Kingdom, decisions of the Courts-Martial Appeal Court may be brought before the House of Lords;[5] in Canada, decisions of the Court Martial Appeal Court may be appealed to the Supreme Court;[6] and in Australia, questions of law may be referred by the Courts-Martial Appeal Tribunal to the High Court.[7] I do not mean to suggest that these schemes are identical, but only to point out that in each instance it is possible for a case decided by the highest military court to reach the highest civilian court without the need to commence a collateral proceeding. The appellate systems of those nations have not collapsed under the added jurisdiction.

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[3] 12 Moore's Federal Practice ¶ 300.04[3], at 1-102 & n. 11 (2d ed. 1982). It cannot be said, therefore, that the peculiarities of military law significantly militate against extension of the certiorari jurisdiction. See generally H. Moyer, Justice and the Military § 6-145 (1972). For a discussion of the relationship between military and civilian law, and the need to foster increased cross-fertilization between the two--a process that would be aided by Supreme Court certiorari review--see Fidell, "If a Tree Falls in the Forest . . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law, 32 JAG J. 1 (1982).

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[4] *See* Pasley, *A Comparative Study of Military Justice Reforms in Britain and America*, 6 Vand. L. Rev. 305, 332 (1953).

[5] Courts-Martial (Appeals) Act 1968, ch. 20, § 39; *see also* Courts-Martial Appeal Rules 1968, Stat. Inst. 1968 *No. 1071*, Rule 18.

[6] National Defense Act § 208, Can. Rev. Stat. ch. N-4. According to information furnished by the President of the Court Martial Appeal Court of Canada, it appears that only one appeal from a decision of that Court has ever been entertained by the Supreme Court of Canada. Letter from Hon. Patrick M. Mahoney to Eugene R. Fidell, Aug. 20, 1982, *citing* *MacKay v. The Queen*, 1980 S.C.R. 370. The Canadian Supreme Court will hear military appeals on questions of law if granted leave to appeal, or as of right if there has been a dissent in the Appeal Court on a question of law. Fay, *Canadian Military Criminal Law: An Examination of Military Justice* (Pt. IV), 23 Chitty's L.J. 228 (1975).

[7] Courts-Martial Appeals Act 1955, §§ 51-52 (Austl.). The Attorney General must find that the question is "of exceptional importance and that it is desirable in the public interest that the matter be referred to the High Court." *See, e.g.*, *Ferriday v. Military Board*, 129 C.L.R. 252 (Austl. 1973).

A variety of objections have been raised to the notion of Supreme Court review. These objections are an insufficient basis for continuing the present arrangements. One common objection is based on the Supreme Court's docket.[8] That the Supreme Court's docket is heavy cannot be denied, and certainly it is understandable that any effort to add to that docket would be resisted. But the argument based on the Supreme Court's docket does not withstand analysis. Thus, the authors of the leading treatise in the area of federal practice, have written that

> it would be most simple and practical to give the Supreme Court appellate jurisdiction over the Court of Military Appeals by way of certiorari. This would give the Supreme Court discretion for direct review of military judgments

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[8] *E.g.*, *Developments in the Law--Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1225 n.108 (1970).

> presenting important federal issues, and without undue burden upon the Court. 9/

9/ 12 Moore's Federal Practice ¶ 300.04[3], at 1-102 (2d ed. 1982) (footnote omitted; emphasis added). The authors add that "[i]f civil federal appellate review is provided over military courts then review by collateral attack should not be tolerated, except where it would be sustained if the case were coming up through the civil establishment." Provided it is limited to those cases in which Supreme Court review could have been sought, the ACLU does not disagree with this assessment, which would lead to a countervailing reduction in the burden on the district courts and courts of appeals attributable to collateral attack on courts-martial under present law. Such a reduction would be a logical development from Congress' purpose in establishing the Court of Military Appeals in the first place. See Wickham v. Hall, 12 M.J. 145, 155 (C.M.A. 1981) (Everett, C.J., dissenting). Other commentators have also noted the need for Supreme Court review. E.g., Comment, United States v. Booker: The Institutional Implications of the Court of Military Appeals' Immunity from Direct Supreme Court Review, 59 B.U.L. Rev. 754, 780-82 (1979).

Professor Moore and his colleagues cautioned that Congress could not confer appellate jurisdiction on the Supreme Court "[t]o the extent military courts exercise jurisdiction over controversies which are not within the scope of Article III." 12 Moore's Federal Practice ¶ 411.13[13], at 5-47; see also id. ¶ 300.04[3], at 1-102 & n.10 (military cases would have to be "otherwise justiciable"). Since the Court of Military Appeals applies a justiciability test, e.g., United States v. Leslie, 11 M.J. 131 (C.M.A. 1981), and refuses to give purely advisory opinions even under its statutory certified question jurisdiction, 10 U.S.C. § 867(b)(2) (1976); e.g., United States v. Bryant, 12 M.J. 307 (C.M.A. 1981) (mem.), no part of its work would seem to exceed the bounds of the "case or controversy" requirement of Article III. On the other hand, a "case or controversy" question might arise if review were sought of a Court of Military Appeals decision

The fear that some may have that an expansion of the certiorari jurisdiction will overwhelm the Court with new cases is therefore unfounded.

Beyond this, what reason is there to fear that military cases will come up to the Supreme Court in inordinate numbers simply because the Department's bill affords a right to counsel in connection with the preparation of a petition for certiorari? Many criminal defendants in both the state and federal courts have court-appointed counsel, yet no one questions whether *their* cases should be heard on writ of certiorari. The ACLU expects that military appellate counsel will zealously represent their clients' rights, but also notes that there is no basis for assuming that such counsel will file petitions for certiorari where such petitions should not, as a matter of professional responsibility, be filed. Military counsel are subject to

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that was purely prospective on some issue. Prevailing parties cannot appeal, *e.g.*, *New York Tel. Co. v. Maltbie*, 291 U.S. 645 (1934) (per curiam), and the Supreme Court would not grant certiorari simply to review dicta. In such a case, Supreme Court review would have to await the first case in which the new rule was applied.

the Code of Professional Responsibility,[10] and in a proper case they should decline to file a petition for certiorari according to the same criteria as would be applied by court-appointed counsel in a civilian prosecution. The law recognizes and expects that an attorney will not file a frivolous certiorari petition,[11] and there is no reason to assume that military appellate counsel will not observe this requirement, giving the same sober attention to the considerations governing grants of certiorari in the Supreme Court's Rules[12] as would a civilian practitioner.

It could be argued that there exists a special need for speedy justice in the military in order to maximize discipline. Requiring a litigant to exhaust collateral remedies as the only means of securing Supreme

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[10] C.M.A.R. 12(a); AR 27-10, ¶ 2-31; AFM 111-1, ¶ 1-10d; Manual of the Judge Advocate General of the Navy § 0142d; U.S. Coast Guard Military Justice Manual § 600-1.

[11] Model Code of Professional Responsibility EC 7-4 (1979); see, e.g., United States v. Williams, 379 F.2d 319 (2d Cir. 1967) (per curiam) (granting motion of appointed counsel to be relieved of duty to file certiorari petition where petition would be frivolous). Cf. Fourth Circuit Student Advocacy Conference: Papers and Remarks, 87 F.R.D. 159, 201-02 (1978) (remarks of Prof. Ralph S. Spritzer); United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[12] S.Ct.R. 17.1.

Court review scarcely serves that purpose.[13] Indeed, the only basis on which the certiorari jurisdiction might not be expanded to military cases is the fact that other types of cases "got there first." This, however, is an irrational basis for making distinctions among categories of lower court decisions for the purpose of availability of Supreme Court review.

I should emphasize that all of this discussion has to do only with the certiorari stage. Thus, whatever increase there may be in the number of petitions for certiorari the Justices and their law clerks will have to review, the net increase in cases decided on the merits will in all likelihood be nil, since the one or two cases per year that may survive the certiorari process might well have percolated up through the collateral review process anyway if there were no certiorari jurisdiction.

B.

It is not enough, however, simply to suggest that the certiorari jurisdiction should be expanded to military cases. Any such measure should be even-handed, affording the prosecution and the defense equal access to the Supreme Court. The Department's proposal has two major defects in this regard. First, it precludes direct Supreme Court review of cases in which the Court of Military Appeals has denied a petition for grant of review. In this connection it is important to bear in mind that two votes (a majority) are needed to grant a petition for review,[14]

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[13] Nor is the availability of federal habeas corpus a satisfactory substitute for direct appellate review by an Article III court. Territory of Guam v. Olsen, 431 U.S. 195 (1977). At present, no Article III court has direct appellate jurisdiction over courts-martial.

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[14] C.M.A.R. 5(a). Despite the language of the Court's rule requiring two votes to grant a petition, at times only one vote was needed as a practical matter. See authorities cited in E. Fidell, Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals 9 n.37 (1978 & Supp. 1980). A former Clerk of the Court has written:

> for many of the years in which Judge Ferguson served, the records of cases indicate that he was able to cause a petition for review to be granted on his vote alone in seeming contradiction of the Court's published quorum rule requiring the concurrence of two judges to grant review of a petitioned case. In effect, Judge Ferguson forced the Court into the equivalent of the minority certiorari rule of the Supreme Court of the United States whereby any four of the nine justices can bring a case on for full review. A close examination of the cases in this Court granted under the Ferguson minority quorum rule in relation to the cases granted under the majority quorum rule could yield much useful insight into the value of a minority rule, especially if it appears that

unlike the practice of the Supreme Court, in which four votes (a minority) are required for a grant of certiorari. Since the vast majority of petitions are denied by the Court of Military Appeals, this provision will have the

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> convictions do get reversed in appreciable numbers after a minority grant when the consequences of a majority rule denying full review would have been to let the conviction stand. In such cases the voting rule on granting petitions becomes truly outcome-determinative. However, since the rule is not statutory in nature, the Court is free to change it. . . . F. Gindhart, *Designing and Implementing a Social Science Module for Management in the United Staes Court of Military Appeals* 75-76 (Inst. for Court Mgt. 1980).

It also appears that the Court applied a one-judge rule during the seven-month period between the departure of Judge Matthew J. Perry and the time Chief Judge Everett joined the Court. During that period, "the two judges serving on the Court [Chief Judge Fletcher and Judge Cook] followed the policy of granting a petition for review if either of the judges believed that 'good cause' had been shown as required by Article 67(b)(3), UCMJ." 1980 Ann. Rep. of C.M.A. and the Judge Advocates General 4 (1981). The early history of the one-judge grant, *see*, *e.g.*, Feld, *Development of the Review and Survey Powers of the United States Court of Military Appeals*, 12 Mil. L. Rev. 177, 181-82 (1961); R. Everett, *Military Justice in the Armed Forces of the United States* 289 (1956), the period described by Mr. Gindhart, *supra*, and the recent interregnum, jointly suggest that the Court could operate effectively under a one-judge-grant rule, even though it places more responsibility on the shoulders of each judge to exercise discretion in granting cases.

effect of severely narrowing the class of cases even eligible for consideration by the Supreme Court.

Second, the Department's proposal allows certiorari only as to those extraordinary writ cases in which

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Although it may well be that the current membership of the Court in practice at times grants review when only one member so desires, this fails to explain the continuing appearance of dissents from denials of petitions for review. A recent example is United States v. Ruffin, 13 M.J. 494 (C.M.A. 1982), where the Chief Judge stated that he would have granted review because the case presented a question of first impression. Id. at 495. See also, e.g., United States v. Cook, 13 M.J. 370 (C.M.A. 1982) (Everett, C.J., dissenting from denial of petition for grant of review); United States v. Willis, 13 M.J. 93 (C.M.A. 1982) (same).

Combined with a variety of other practices (such as the Court's tradition of searching the record and regularly specifying issues sua sponte, see generally Fidell, The Specification of Appellate Issues by the United States Court of Military Appeals, 31 JAG J. 99 (1980), as well as failing to articulate the grounds on which "good cause" will be found for granting review under Article 67(b)(3)), the two-judge grant has helped to blur the distinction between the petition stage and the merits stage of the Court's review process. This has led to excessively lengthy briefs at the petition stage, and an expansion of what the Court itself has called "the certiorari process" to the point where it "consumes substantially over half of the Court's resources and time." 1978 Ann. Rep. of C.M.A. and the Judge Advocates General 5 (1979). Requiring two votes to grant a petition turns the threshold question facing the Court into a dress rehearsal for the merits, thereby preventing the Court from spending more time on those cases before it for plenary consideration. It also casts doubt on the claim that denial of a petition has no precedential value. See United States v. Mahan, 24 C.M.A. 109, 51 C.M.R. 299, 1 M.J. 303, 307 n.9 (1976); Fidell, supra, at 103-04 n.26.

the Court of Military Appeals has granted relief. Since most writs are sought by the defendant, this limitation effectively tips the scales in favor of the prosecution.[15] The prosecution could obtain Supreme Court review of a grant of extraordinary relief, but an accused could not

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Appeals by leave of a single judge, it may be added, are hardly a novelty. They are permitted in some circumstances by the District of Columbia Code, D.C. Code § 17-301(b) (1981); D.C. App. R. 6(d). They are contemplated by the British Courts-Martial (Appeals) Act 1968, §36(1); *see* Courts-Martial Appeal Rules 1968, Rule 8, have been suggested for use by the Court Martial Appeal Court of Canada, Fay, *supra* note 6, at 229, and are by no means without precedent in either federal or state law. *See, e.g.*, Rev. Stat. §999; S.Ct.R. 36, 275 U.S. 595, 620-21 (1928); *Sage v. Central R.R. of Iowa*, 96 U.S. 712, 715 (1878); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 414 (1943) (per curiam); N.Y. Crim. Proc. L. §§ 460.15-.20 (McKinney 1971). Without in any way wishing to resurrect the discredited notion that the Court of Military Appeals is merely an administrative agency, rather than a court, *see* H.R. Rep. No. 90-1480, 90th Cong., 2d Sess. (1968); *Shaw v. United States*, 209 F.2d 811 (D.C. Cir. 1954), I might also observe that in some federal agencies with discretionary review powers, it is possible for a single commissioner to grant review by the full commission. *E.g.*, 29 C.F.R. § 2200.92 (1981) (OSHRC). Surely it should be no harder for a military accused to obtain civilian review by the Court of Military Appeals.

15/ Article III, § 2, of the Constitution gives Congress authority to regulate the appellate jurisdiction of the Supreme Court. This authority is not, however, limitless, and the lopsided character of the Departmental bill raises a substantial question whether those limits have been exceeded. Revision of the proposal to balance the scales would make it possible to avoid a potentially troublesome constitutional question.

obtain review of a denial of such relief. Such a system is fundamentally unfair.

The ACLU strongly favors certiorari, and accepts the Department's certiorari provision as an improvement over the present state of affairs. At the very least, however, this Committee should alleviate the one-sidedness of the provision by amending Article 67 to provide that the Court of Military Appeals must review any case in which one of the judges finds good cause for doing so. In this fashion, the congressional objective of civilian review of courts-martial will be better served, and access to the Supreme Court not guarded quite so jealously as would be the case under the Department's proposal.

Pretrial and Post-trial Advice

One provision of S. 2521 would permit the pretrial advice in general courts-martial to be furnished to the convening authority orally. The explanatory statement does not indicate the reason for this change,16/ but I would assume that the purpose is to conserve processing time. Whatever the reason, this change would be extremely unfortunate. At least if the pretrial advice is reduced to

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16/ 128 Cong. Rec. S5003-04 (daily ed. May 12, 1982).

writing, it would be possible at some later date for reviewing courts or officials within the Office of the Judge Advocate General to determine whether the advice was correct, and if not, whether the accused was prejudiced as a result. If the advice is not reduced to writing, an important safeguard will have been rendered useless. The ACLU opposes this change.

As for post-trial advice, the ACLU is troubled by the provision in S. 2521 that would permit such advice to be limited to those matters that may be required by Presidential direction (presumably in the Manual for Courts-Martial). The need for advice on other matters may well arise as a result of decisions of the Courts of Military Review or Court of Military Appeals. It would therefore be an error to permit the requisite advice to be limited to those considerations that may be incorporated in the regulations.

Sentencing

A variety of sentencing reforms appear in S. 2521 and the Departmental proposal. In addressing these, the ACLU begins with the presumption that the civilian and military systems should be as alike as possible, giving due recognition to those areas in which reasons of practicability require a different approach under the UCMJ.[17] In the case of the proposals for sentencing and suspension of sentences by military judges, this standard leads to divergent results. The ACLU does not perceive a need for a difference from federal practice as far as the power to suspend sentences is concerned. Accordingly, that power should be conferred on military judges, without prejudice to the clemency powers of commanders.

As far as sentencing itself is concerned, however, there is a basis for differences between civilian and military practice. For one thing, "military justice does not utilize minimum sentences as do civilian courts."[18] In addition, unlike civilian federal judges, military judges lack even rudimentary tenure protection. To the extent that they "ride circuit," they may well not have a sense of local needs and conditions that could bear on sentencing. Above all, many military personnel have come to believe that the right to sentencing by jury (including the option for enlisted personnel to participate in that process) is an important safeguard against command influence. Opinions may differ as to how effective a safeguard it is, but the perception itself is important, and, in the ACLU's view, sufficient reason not to change the present system.

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[17] *See* 10 U.S.C. § 836 (1976 & Supp. IV 1980).

[18] *United States v. Davidson*, 14 M.J. 81, 87-88 n.2 (C.M.A. 1982) (Everett, C.J., concurring).

Finally, the ACLU opposes increasing the punishment powers of the special court-martial. A jury of three should not be authorized to sentence a person to prison for a year.

Review of Courts-Martial in the Offices of the Judge Advocates General

Although attention understandably tends to focus on the most serious cases under the Uniform Code, the Subcommittee should bear in mind that cases decided by the Court of Military Appeals and the Courts of Military Review are only the tip of the court-martial iceberg. Just because the other cases may not involve very lengthy sentences is no evidence that they do not involve difficult issues. As Chief Justice Warren said in Sibron v. New York,[19] "[m]any deep and abiding constitutional problems are encountered primarily at level of 'low visibility' in the criminal process--in the context of prosecutions for 'minor' offenses which carry only short sentences." This is equally true in the military.

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[19] 392 U.S. 40, 52 (1968) (footnote omitted) (six months sentence). At the end of the quoted sentence, the Sibron Court cited Thompson v. City of Louisville, 362 U.S. 199 (1960), which involved a $20 fine for loitering and disorderly conduct. Numerous other cases have raised major issues despite the absence of severe penalties. E.g., Secretary of the Navy v. Avrech, 418 U.S. 676 (1974)

Special courts-martial awarding sentences of six months (whether or not a bad conduct discharge is adjudged) should be reviewable in the Courts of Military Review unless the defendant affirmatively waives such review. Such review is even more necessary if the sentence exceeds six months' imprisonment. In addition, the Code should require that a verbatim transcript be prepared whenever a special court awards six months' confinement (again, regardless of whether a discharge is adjudged), since otherwise meaningful judicial review will be thwarted. Of course, the Court of Military Appeals should be empowered to review any case decided by a Court of Military

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(one month suspended confinement at hard labor, reduction to E-1, forfeiture of pay for three months); *Ward v. City of Monroeville*, 409 U.S. 57 (1972) ($100 fine); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (90 days); *Adderly v. Florida*, 385 U.S. 39 (1966) (three months or $100); *Garner v. Louisiana*, 368 U.S. 157 (1961) (lunchcounter sit-in; four months' confinement, of which three would be suspended on payment of $100 fine); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) ($200 fine); *District of Columbia v. Clawans*, 300 U.S. 617 (1937) (60 days or $300 fine); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ($10 or 10 days).

Review, to ensure adherence to the principle of civilian review.

This leaves the class of cases in which only relatively slight punishments (if confinement of any duration can ever be considered "slight") may be adjudged. These cases represent the vast bulk of the military justice caseload, and yet they receive the least attention because they are not reviewed in any court. For these cases, the ACLU suggests that all reviews conducted in the Office of the Judge Advocate General--whether at the request of the accused pursuant to Article 69 or as part of the automatic review process--be performed by officers certified as military judges. These officers would not have to be qualified as general court-martial judges, but only as special court-martial judges. When performing such reviews, they would not be "sitting" as judges, but their judicial certification would help to ensure thoroughness, and would heighten the respect that the review process receives "in the field."

Appeals to the Courts of Military Review

I have already suggested that the jurisdiction of the Courts of Military Review should be expanded to include cases in which the sentence extends to six months' confinement. The jurisdiction of these courts should not be automatic except in capital cases, but rather through appeal by the defendant. The ACLU is concerned that many defendants will waive their rights simply in order to leave the military as quickly as possible. A waiver of appellate rights should be accepted if it is knowing and voluntary, but the ACLU is concerned that the opportunities for overreaching are such that many waivers could be the result of undue influence. The ACLU agrees with the Department of Defense that appellate waivers should only be effective if they are affirmative; allowing waivers through inaction, as permitted under S. 2521, would create difficult problems of proof in determining whether the defendant's choice was knowing and voluntary.

Both S. 2521 and the Department's bill provide for appeals by the prosecution. The ACLU recognizes an analogy to civilian practice in this area, but suggests that neither of the proposals is satisfactory in this respect. S. 2521, for example, would preclude appeal by the defendant from an adverse decision by a Court of Military Review on a government appeal. Preventing the accused from obtaining immediate review of such an appeal makes the appellate process a one-sided affair, and subverts the role of the Court of Military Appeals and with it, the congressional objective of civilian review. This provision should not be passed.

Speedy trial issues are also raised by both proposals. The Department's bill would provide that delays directly attributable to prosecution appeals would not be charged to the prosecution for speedy trial purposes, while S. 2521 provides that delays resulting from a prosecution appeal shall not be charged to either side for this purpose. Neither of these provisions is well-founded since if a prosecution appeal was not only unmeritorious, but frivolous, the delay should most definitely be charged to the prosecution for speedy trial purposes. Any other rule would offer an incentive to the government to take appeals without regard to the defendant's constitutional right to a speedy trial. This risk is particularly great under S. 2521, under which prosecution appeals may be directed by the convening authority, who will typically not be an attorney.

Each of these provisions was inspired, in greater or lesser degree, by 18 U.S.C. § 3731 (1976). That statute, however, includes a provision relating to release of the accused "[p]ending the prosecution and determination of the appeal." Neither S. 2521 nor the Department bill includes such a provision. If a government appeal is to be authorized, the measure should make express provision for release pending appeal in appropriate cases.

The Military Justice Act of 1968 was passed, among other things, to enhance the status of the Courts of Military Review. It has achieved that purpose in part, but there is still much to be done. The ACLU has two specific suggestions in this regard. First, the Code should provide some tenure protection for judges of these courts. A minimum term of four years would seem appropriate and consistent with service personnel needs, with exceptions permitted only on a documented showing of military exigency. Appellate military judges should be removable for cause only after notice and opportunity for hearing. Grounds for removal should be uniform and limited to "neglect of duty or malfeasance in office, or for mental or physical disability."[20] These steps would do more to enhance the stature of these courts than the name change effected in the 1960s.

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[20] *See* 10 U.S.C. § 867(a)(2) (1976) (grounds for removal of C.M.A. judges); *cf.* 28 U.S.C. § 372(b) (Supp. IV 1980). Procedures and standards for ensuring judicial fitness have been spelled out in detail by some services, AR 27-10, ¶¶ 4-9 *et seq.*; U.S. Coast Guard Military Justice Manual Pt. 606, *but not* in others. AFM 111-1, ¶ 13-10; Manual of the Judge Advocate General of the Navy § 0142c5. The standards should be spelled out, should be uniform, and should follow those applicable to the judges of the Court of Military Appeals.

Second, a system should be established for the interservice assignment of appellate military judges, just as military trial judges may sit on cases in other services,[21] and just as civilian federal judges may sit by designation.[22] Such a program would foster a healthy interaction among the Courts of Military Review, and could help reduce backlogs. The program could require that a majority of the judges sitting on any case be a member of the accused's service. No additional expense would be involved, and the interest in uniformity as well as open exchange of views would be served within a system that otherwise runs the risk of becoming stale.

Review by the Court of Military Appeals

The ACLU favors simplification of the jurisdiction of the Court of Military Appeals. At present, the Court's jurisdiction is a hodge-podge of mandatory reviews, certificates from the Judge Advocates General (including writ cases, for which the certification clause of the statute makes no provision),[23] review on petition of the accused, review on petition of the prosecution (for which the petition clause of the statute also makes no provision),[24] and petitions for extraordinary relief. Congress should step in and rationalize this entire area. The ACLU suggests the following arrangements:

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[21] MCM, 1969 (rev.) ¶ 4g(1).

[22] 28 U.S.C. §§ 291-96 (1976 & Supp. IV 1980).

1. There should be a single form of appellate review, available at the request of either the prosecution or the defense, with respect to decisions of the Courts of Military Review. This will reduce the time spent by the Court on double reviews: once to decide whether to take the case, and again on the merits. The Court could act summarily on many cases--particularly those in which no errors were assigned--while still reserving the right to examine the whole record and specify errors in appropriate cases. The power of the Judge Advocates General to certify questions to the Court should be abrogated because it is no longer necessary, inasmuch as the Court has held that it can entertain government petitions for grant of review.

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[23] See United States v. Redding, 11 M.J. 100, 113 (C.M.A. 1981) (Fletcher, J., dissenting).

[24] See United States v. Caprio, 12 M.J. 30, 33 (C.M.A. 1982) (Fletcher, J., dissenting).

2. There should be an extraordinary writ jurisdiction similar to that exercised by the United States courts of appeals under the All Writs Act, but reflecting the role of the civilian Court of Military Appeals in ensuring compliance with the provisions of the Code.[25]

3. Death cases, if any, should be subject to mandatory review.

Finally, the ACLU recommends deletion of the political balance requirement for the Court of Military Appeals. Such a provision has no place in determining the composition of courts of criminal appeal, and does nothing to enhance public respect for the military justice system. For similar reasons, the statute should be changed to make it clear that the President may designate a chief judge only when there is a vacancy in the chief judgeship.[26]

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[25] McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

[26] Similar changes were proposed by the Administrative Conference of the United States in 1977 with respect to the former Customs Court. See 1 C.F.R. § 305.77-2 (1979). Congress altered the law to permit the Chief Judge of the Court of International Trade to serve as such until age 70. Compare 28 U.S.C. § 251 (1976) with id. § 251(b) (Supp. IV 1980). The Administrative Conference's suggestion as to the political balance requirement was not followed. The Tax Court is, like the Court of Military Appeals, an Article I court; its judges are appointed "solely on the grounds of fitness to perform the duties of the office." 26 U.S.C. § 7443(b) (1976).

Any other arrangement represents a potential threat to the independence of the judiciary. Our fellow-citizens in uniform deserve a first class justice system. Without apolitical appointments and guarantees of judicial independence, that goal will always be in question.[27]

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to questions.

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[27] The ACLU has no objection to the inclusion of a Marine Corps representative on the Code Committee, of which the judges and Judge Advocates General are already members. Because of the Code Committee's functions, it is strongly recommended that the Committee be further expanded to include representatives of the civilian bar and nonlegal community, and that its meetings be open to the public.

WAIVER OF APPELLATE RIGHTS

Senator **Jepsen**. Mr. Fidell, on page 21 of your statement you state that "A waiver of appellate rights should be accepted if it is knowing and voluntary, but the ACLU is concerned that the opportunities for overreaching are such that many waivers could be the result of undue influence." Could you please explain precisely what your concerns are with respect to opportunities for overreaching and undue influence?

Mr. **Fidell**. I will do my best. Typically the best side of a justice system is the side that appears in the transcript of the trial or in the appellate decision. It looks great, it looks smooth, lawyers have functioned on it. Our system should operate on the record and in a way that is carefully supervised.

The concern that is addressed in the language you quoted, Mr. Chairman, is that in real life many important decisions are made by servicemen without the presence of a lawyer or even if the individual has had an opportunity to consult with a lawyer, he may well get other advice from the yeoman in the legal office or somebody in the personnel office or he may be dying to get out of the service, and the immediacy of his wish to go home may be such that he may undertake an act in terms of waiver of rights based on God knows what advice given from a perhaps junior enlisted person that he will come to regret.

I don't know that I can be more specific than that. I just have a concern that in the military community which, as a prior witness properly mentioned, is a hierarchical community, there are dangers that people may take steps, even people who have had a chance to talk to an attorney or people who have gone through a colloquy with a military judge who has explained all their rights on the record, and 2 hours later they may get to the personnel office and the yeoman in the personnel office may say now, "Jones, you know that you could be out tonight if you sign this form," or something like that. This is the concern I am speaking to. I apologize for not being able to articulate it any better, but that is what is on my mind.

Senator **Jepsen**. I have no further questions at this time. We will have some for the record.

[The questions submitted and answers supplied follow:]

RESPONSES OF THE
AMERICAN CIVIL LIBERTIES UNION
TO QUESTIONS FOR THE RECORD

1. Supreme Court Review

Are there any other Article I courts whose decisions are not subject to Supreme Court review, at least via petition for a writ of certiorari? If so, why are they?

> The only federal courts (other than those created under the Uniform Code of Military Justice) whose decisions are not ultimately subject to review by the Supreme Court are minor insular tribunals such as the Wake Island Court, 32 C.F.R. § 935.60 (1981), Wake Island Court of Appeals, id. § 935.65, Midway Islands Court, id. § 762.50, High Court of the Trust Territory of the Pacific Islands, 5 T.T.C. §§ 51 et seq. (1980), and High Court of American Samoa, Am. Sam. Code Ann. § 3.0101 (1981), and the United States Court for Berlin, the latter having been created under Article II of the Constitution. See United States v. Tiede, 86 F.R.D. 227, 237 (Berlin 1979). Decisions of the major Article I courts (the local courts of the District of Columbia, the Tax Court and the new United States Claims Court) are ultimately reviewable by the Supreme Court.

Do you believe Supreme Court review is necessary to "conform" the case law of the military justice system to that of the civilian justice system? Is such conformity desirable in all instances? If so, why?

> For the reasons stated in our prepared testimony, Supreme Court review is important in harmonizing military and civilian federal caselaw. Precise conformity with civilian doctrines is not

invariably appropriate, but should be achieved to the extent practicable, as Congress contemplated in enacting Article 36 of the Uniform Code, and its predecessor provision, Article 38 of the Articles of War. In some instances, the differences rest on a textually demonstrable constitutional basis, as in the case of the right to indictment by grand jury. U.S. Const. amend. V. In others, objectively verifiable reasons inherent in the performance of military functions may justify a difference between civilian and military federal law doctrines. See generally Fidell, Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs, 4 Mil. L. Rep. 6049 (1976). The Military Rules of Evidence are strong proof that the two bodies of law have much in common.

In your statement, you cite the United Kingdom, Canada and Australia as foreign military justice systems whose decisions are reviewed by their high courts.

--Are the military justice systems in those countries structured the same way as ours? For example, are military trials in the United Kingdom, Canada or Australia more integrated into the civilian system? Do military defendants in those countries have the same (or greater) protections as those afforded to the accused by our system of military justice?

As common law countries, the United Kingdom, Canada, Australia and the United States have much in common. The shared legal tradition is reflected in military law as well as civil law, inasmuch as the British Articles of War and naval equivalent were the basic source for military law in all four countries. It is therefore not surprising that the systems should be similar in important ways. One important structural similarity is that since World War II each country has created a civilian court to hear court-martial appeals. In other respects, of course, the systems diverge. For example, unlike the American system, civilian counsel will be made available to indigent military appellants in both the United Kingdom, see The Courts-Martial Appeal Legal Aid (Assessment of Resources) Regulations 1969, Stat. Inst. 1969 No. 175; The Courts-Martial Appeal Legal Aid (Fees and Expenses) Regulations 1969, Stat. Inst. 1969 No. 176; The Courts-Martial Appeal Legal Aid (General) Regulations 1969, Stat. Inst. 1969 No. 177, and Canada. Can. Ct. Martial App. Ct. R. 19. "The criteria applied by the President [of the Court Martial Appeal Court of Canada] in approving appointment of civilian counsel do not take account of the availability of military counsel and assume the government's intention to serve military appellants under Rule 19 rather than having them seek assistance through general avenues of legal aid." Letter from Hon. Patrick M. Mahoney to Eugene R. Fidell, cited in ACLU Testimony at 5 n.6. In contrast, in the United States, civilian free legal assistance has not been provided to military defendants, although perhaps it should be. See Cook, Courts-Martial: The Third System in American Criminal Law, 1978 So. Ill. U.L.Rev. 1, 15 (suggesting that if defense of military cases becomes too burdensome to be economically workable for civilian counsel or the military client, "then it might be time to change military law to provide for representation by civilian counsel, at least on the same basis that a defendant in a federal civilian criminal court can have appointed counsel"). The Criminal Justice Act does not apply to courts-martial. See 18 U.S.C. § 3006A (1976).

Without making a detailed comparative study of the foreign military justice systems in question (a task that the Library of Congress might be asked to

> undertake), the ACLU is reluctant to suggest that any of these systems is on balance fairer or less fair than our own. To the extent that they allow the military appellant to appeal from the highest military court to the highest civilian court, these systems come out ahead in our view. The availability of supreme court review has been cited as one of the strengths of the Canadian system. See MacKay v. The Queen, 190 S.C.R. 370, 401.

--Is the caseload of the highest courts of these countries comparable to that of the U.S. Supreme Court?

> The ACLU has been unable to obtain comparative caseload statistics for the House of Lords, the Supreme Court of Canada, or the High Court of Australia. We understand, however, that the Supreme Court of Canada, like our own Supreme Court, is "busier than it should be." Letter from Hon. Patrick M. Mahoney, supra, at 1. Military cases have not contributed to the Canadian Court's caseload; as of this summer, only one court-martial appeal had ever been heard by that court.

You comment about "substituting" the opportunity for Supreme Court review for the opportunity to collaterally attack a decision via a writ of habeas corpus initially filed in the lower federal courts.

--Does a convicted criminal defendant in state court have to make a choice between taking his case to the Supreme Court via a writ of certiorari or challenging the state court ruling in federal district court via a writ of habeas corpus?

A state defendant is not required to make such a choice.

Generally, what in your view was Congress' rationale for not authorizing petitions for a writ of certiorari when the Court of Military Appeals was established? How has that rationale changed in your view?

There were probably two reasons Congress failed to extend the certiorari jurisdiction to decisions of the United States Court of Military Appeals when the Uniform Code was enacted in 1950. First, Congress was probably under the impression that there was little overlap between military and civilian law--an impression that was quite true at that time. There was correspondingly little sense that the great issues of constitutional law that are at the heart of the Supreme Court's responsibilities were likely to arise in the military. Both of these circumstances have changed significantly in the intervening thirty years. Events have demonstrated that issues of considerable moment can and will arise under the Code. Whether the drafters should have anticipated these changes or the remarkable growth of constitutional law is not the point; these changes took place, have had a dramatic impact on military law, and constitute a basic shift from the conditions that prevailed when the Code was enacted.

Beyond this, it is well to recall that the Code was in many ways a radical shift from prior arrangements regarding military justice. See Waltz, The Court of Military Appeals: An Experiment in Judicial Revolution, 45 A.B.A.J. 1185 (1959). The framers broke with tradition in many respects, and there may have been a concern about imposing an entirely new institution on the federal judicial organization chart. Ten years after the Code took effect it could still be said that the Court of Military Appeals was "one of the newest and most controversial institutions of the Federal Government." Feld, Development of the Review and Survey Powers of the United States Court of Military Appeals, 12 Mil. L. Rev. 177, 179 (1961). Given this, it is hardly surprising that Congress would proceed with caution in terms of expanding the certiorari jurisdiction until the new court had had an opportunity to grow into its role and demonstrate that its work was at a level that would warrant Supreme Court review. Such review is a partnership between the Supreme Court and the intermediate court, whose job it is not only to decide the case initially, but also to help frame the issues for further review. After thirty years, the Court of Military Appeals is ready, in the ACLU's opinion, to assume the responsibilities of that partnership.

You comment that the proposal for Supreme Court review is unlikely to lead to any "net increase in cases decided on the merits" because "one or two cases per year that may survive the certiorari process might well have percolated up through the collateral review process anyway."

--Do you have any statistics on what contribution collateral attack cases involving military personnel currently are making to the Supreme Court's certiorari docket?

The Committee may wish to direct this question to the Department of Defense or the Office of the Solicitor General. In making this suggestion, we would note that the burden of collateral attack cases falls on the lower federal courts even more than on the Supreme Court. The Committee may therefore wish to obtain statistics as to the number of military justice collateral review cases filed in the district courts and Court of Claims, and appeals taken to the courts of appeals, as well as certiorari petitions filed.

Do you have an estimate of how many additional cases might be eligible for petition to the Supreme Court if only one judge was necessary to grant a petition for review in the Court of Military Appeals? Are there other Article I courts where such a court management rule is prescribed by statute?

In FY1980 (the most recent period for which statistics have been published), the Court of Military Appeals denied 1340 petitions for grant of review. 1980 C.M.A. Ann. Rep. 15 (1981). In FY1979, 1328 petitions were denied. 1979 *id.* 17 (1980). Obviously, only a fraction of these cases would evolve into certiorari petitions, since many of them will raise no issues that are even arguably "cert-worthy."

The Court of Military Appeals does not ordinarily indicate the vote by which a petition for grant of review has been denied. At present, two votes are needed either to grant or to deny. C.M.A.R. 5(a). Occasionally, a judge will note his dissent from the denial of a petition, thus indicating that his was the only vote to grant. *See*, *e.g.*, cases cited in ACLU Testimony at 13 n.14. Presumably, there are other cases in which one of the judges would have granted the petition, but no formal dissent was noted. Absent complete information as to the number of these cases, it is impossible to gauge the number of cases that would become eligible for potential Supreme Court review under the compromise we have suggested. The Committee may therefore wish to ask the Court of Military Appeals to furnish statistics as to the number of cases in which review was denied by 2-1 vote over an appropriate number of years.

The incremental burden of adding military cases should be evaluated against the total federal and state "cert-eligible" caseload. Even under the ACLU's one-judge-grant approach, military cases would constitute a minor addition to the Supreme Court's caseload. The Committee should first consider the number of criminal cases decided by the Article III courts of appeals and state appellate courts. According to data furnished by the Administrative Office of the United States Courts, 4522 federal criminal appeals were terminated in the year ending June 30, 1982. See 1982 Ann. Rep. Dir. Admin. Off. of U.S. Courts A-2. All criminal appeals decided by the United States courts of appeals are reviewable by the Supreme Court. 28 U.S.C. § 1254(1) (1976). The Supreme Court can also review criminal cases arising in the state courts in which a federal question is presented. According to information furnished by the National Center for State Courts for 1977 (the latest year for which data are available), 40,000 criminal cases were appealed to state intermediate appellate courts, and 17,000 were appealed to state courts of last resort.

These data permit the following rough estimate: if we assume 5000 criminal appeals to the courts of appeals, and 20,000 criminal appeals to state courts of last resort, the addition of 1500 cases in which the Court of Military Appeals denied review (i.e., assuming that the Court in each of these 1500 cases voted 3-0 to deny review) would generate a 6% increase in the number of criminal cases eligible for certiorari. A more realistic estimate would include cases in the intermediate state courts, since certiorari runs to the highest state court in which judgment could be had. 28 U.S.C. § 1257 (1976). Since some portion of the 40,000 intermediate state court appeals must fall into that category, the addition of 1500 cases to the "cert-eligible" category actually expands the Supreme Court's potential criminal caseload by somewhat less than 6%.

This figure, however, represents only the criminal cases. In the United States courts of appeals, criminal appeals constituted only 16% of the 27984 cases terminated in the year ending June 30, 1982. In state courts of last resort, the 17,000 criminal appeals represented only about half of the 34,000 filings for the most recent reported period, and in intermediate state courts, the 40,000 criminal appeals represented only about 42% of the 95,000 filings for the same period. Of course, many of the state cases would not involve federal questions necessary to invoke the Supreme Court's jurisdiction, but it is still obvious from these data that an additional 1500 cases would constitute a very small perturbation of the total overall "cert-eligible" cases.

As indicated in the ACLU's testimony, page 14, note 14, in certain minor cases, a single judge of the District of Columbia Court of Appeals may grant leave to appeal. D.C. Code § 17-301(b) (1981); D.C.App.R. 6(d). That court was created under Article I of the Constitution. See generally Palmore v. United States, 411 U.S. 389 (1973). It is interesting to note that the Texas Court of Military Appeals (whose jurisdiction extends to National Guard matters in that state), has provided by rule that it will hear appeals from all general and special courts-martial as well as "[a]ll other cases where *a* Judge of this Court has made a determination that there may be a constitutional issue involved." Tex. C.M.A.R. 3.B (1977) (emphasis added). The ACLU is aware of no appellate court that has power to thwart a petitioner's access to the Supreme Court, as would be permitted under the departmental proposal. *See A Look at Chief Judge Robinson O. Everett*, 5 Dist. Law. No. 6, at 31, 37 (1981).

Finally, the ACLU wishes to reemphasize that military counsel are no more likely to file frivolous certiorari petitions than are civilian counsel. Because the filing of a frivolous certiorari petition is improper in either context, it is unfair to assume that military counsel will view their responsibilities as officers of the court with less seriousness than members of the civilian legal community.

2. Sentencing and Suspension by Military Judges

Does it make sense in your view to give the military judge power to suspend sentences if he does not have the power to impose the sentence in the first place (*i.e.* where the jury imposes the sentence)? If so, why?

The power to suspend sentence should be conferred upon whoever adjudges the sentence, whether that be the military judge or the members of the court-martial.

3. Extending Jurisdiction of Special Court-Martial

Please elaborate on your reasons for opposing the increase in punishment power of the special court-martial. Would your position be the same if the protections afforded an accused when a bad-conduct discharge is adjudged by a special court-martial (*e.g.* legally qualified counsel, presence of a military judge, preparation of a complete record, and the opportunity to appeal to a Court of Military Review) apply when confinement is for more than 6 months?

> The single greatest defect in the special court-martial as it is now constituted is that in most cases (i.e., those in which a bad conduct discharge is now awarded), no military appellate court is required to review the record of trial. The remedies suggested in the second sentence of this question would help alleviate this problem, but not entirely. In particular, as emphasized in our testimony, it is our view that a jury of three laymen should not be empowered to send a defendant to prison for a year, as S. 2521 would permit. In addition, we note that the protection afforded to general court-martial military judges by Article 26(c) is not applicable to special court-martial judges.

4. Speedy Trial Issues

In the civilian justice system is a delay associated with a government appeal charged to the prosecution for speedy trial purposes?

> The Speedy Trial Act excludes "delay resulting from any interlocutory appeal" "in computing the time within which an information must be filed, or in computing the time within which the trial of any such offense must commerce." 18 U.S.C. § 3161(h)(1)(E) (Supp. IV 1980); e.g., United States v. McGrath, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). The delay will not be justified, however, where "the government's position was so weak that it should have known it would lose" its appeal. United States v. Herman, 576 F.2d 1139, 1146 (5th Cir. 1978). Appeals that are "arbitrary,

negligent, or purposefully oppressive," United States v. Bishton, 463 F.2d 887, 890 (D.C. Cir. 1972) (per curiam), or taken in bad faith or where the charges are not serious, Herman, supra, are exceptions to the general rule. Where the government "formally drops charges"--a very different matter from an involuntary dismissal or defeat on a suppression motion--its subsequent conduct is judged under the Due Process Clause rather than the Speedy Trial Clause, but even here it must act in good faith. United States v. MacDonald, 102 S.Ct. 1497, 1501 (1982). Thus, whatever formulation is employed--frivolousness, lack of good faith, oppression--the time spent on such prosecution appeals is properly charged to the prosecution.

5. Tenure for Judges of the CMRs

Is your suggestion for tenure for judges of the Courts of Military [Review] based on a perception that these judges--without tenure--might be susceptible to removal or reassignment as a function of their decisions? If so, what is the basis for that perception?

First, the good news. One area in which the independence of the courts of military review has been questioned in the past was the power of the Judge Advocates General to select opinions for publication. See, e.g., H. Moyer, Justice and the Military 753 (1972). These courts now enjoy substantial autonomy in this regard, Fidell, "If a Tree Falls in the Forest...": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law, 32 JAG J. 1, 13 n.70 (1982), although on occasion in one branch the Judge Advocate General has directed publication of cases not designated by the court. Obviously, too, every reversal of a conviction by a court of military review is some evidence of independence. More must be said, however, since our system of justice is predicated on the notion that we will avoid even the appearance of injustice or partiality. In one instance that we know of, the question of command influence on a court of military review was raised in the Code Committee. See Minutes of Code Committee Meetings of Sept. 18, 1978 and Dec. 18, 1978. The matter appears to have been investigated, see Memorandum from BG H. J. Clausen to COL W. Alley, Feb. 16, 1978, and concerns about possible impropriety allayed.[1] Since perceptions are important in assessing the present arrangements, we would also note that many litigants intentionally bypass the courts of military review when seeking extraordinary relief. We believe this phenomenon reflects continuing reservations about the independence of these courts.

The idea of a court of criminal appeals whose appointed judges enjoy no fixed tenure is, we submit, fundamentally inimical to prevailing standards of judicial administration. As is true of "command influence" generally, it is difficult to assess the subtle influence a lack of tenure may have on the judicial process. The ACLU strongly believes that confidence in the independence of these important intermediate courts would be heightened, in keeping with Congress' intent in passing the Military Justice Act of 1968, by affording tenure to their judges.

For purposes of comparison, even judges of courts as obscure as the Wake Island Court and Wake Island Court of Appeals (who are appointed by the General Counsel of the Air Force) have the minimal protection of a one-year term of office. 32 C.F.R. §§ 935.60(b), 935.65(b) (1981). While the Constitution may not be offended by judges who lack life tenure, Palmore, supra, at 410, this hardly justifies a system where judges have no tenure at all. Term appointments are not a complete guaranty of judicial independence, see Metzger, Why I am No Longer a Judge, 177 Nation 52 (1953); Metzger, Judges or "Mere Instruments," 173 Nation 202 (1951), but they are the constitutional minimum.

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[1] Parenthetically, this episode tends to confirm the desirability of including public members on the Code Committee, and opening its meeting to the public, see ACLU Testimony at 27 n.27, as well as the need for public access to Code Committee minutes, without which this episode would have remained a secret.

6. Reasons for Changing the System

In your view, what are the soundest reasons for making an adjustment to the military justice system? Should we be making changes for administrative convenience? Should we make changes just to conform the military justice system to our civilian criminal justice system? Should we be attempting to identify and fix specific problems in the system?

The soundest reasons for changing the system of military justice are (1) improvement of the quality of justice dispensed by the system, and (2) reduction of needless delay, inconvenience or expense. Obviously, no change suggested by the second set of criteria should be undertaken if it detracts from the first objective. The ACLU favors conforming the system as much as possible to the civilian federal model, but not at the expense of important procedural safeguards conferred by Congress in recognition of the special circumstances in the military and in response to demonstrated abuses.

The legislative process functions best, we think, when responding to specific problems. On the other hand, this in no way relieves Congress of the duty to attend, at the proper time, to longstanding problems. The lack of Supreme Court

> certiorari jurisdiction over military cases falls in this category, although we assume the Department's advocacy of this adjustment (while antedating the case of Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982)) may have received additional momentum because of that case.

How would you characterize overall the proposals before us? In your view do these proposals focus solely on areas where the military justice system is not working, is having problems? What elements of these proposals, in your view, respond to specific problems? What elements do not?

> To the extent just indicated, the certiorari proposal is not unrelated to current developments. The same is true with respect to our suggestion regarding transferability of the chief judgeship. The ACLU's proposal for simplification of the Court of Military Appeals' jurisdiction is in response to recent decisions of that court, as indicated in the text accompanying footnotes 23-24 of our prepared testimony. The proposals as to the treatment of drug offenses also reflect contemporary concerns about a specific problem confronting each of the Armed Services. Other elements of S. 2521 and the departmental bill do not appear to relate to immediate problems, but are more in the nature of systemic adjustments based--we assume--on experience under the Code over a prolonged period; to the extent problems are addressed, they are more "chronic" than "acute." Such changes should not be enacted without a full appreciation of the nature and scope of the evil sought to be corrected; mere "druthers" are an insufficient basis for legislative action.

7. Impact on the Rights of the Accused

How would you characterize the impact of the proposals now before the Subcommittee on the rights of the accused in the military justice system? Are those rights enhanced overall? Are they generally left at about the same level of protection? Are they diluted?

> Overall, S. 2521 reduces the protections afforded to the accused. The departmental proposal presents a harder case since it includes one provision--certiorari review--that could be of substantial benefit to military defendants (particularly if the suggestions on pages 10-15 of the ACLU's testimony were adopted), and a number of others that are either neutral or contrary to defense interests. Increased sentencing power in special courts-martial, termination of jury sentencing, abolition of the right to written pretrial advice in general courts-martial, and reduction in the power of boards for correction of military records all work against the interests of the accused.
>
> Increasing the powers of the special court-martial to permit confinement for one year would lead to fewer general courts-martial, and correspondingly tend to increase the appellate role of the Judge Advocates General. A review of current Article 69 appellate procedures reveals the following problems: (1) except for the Army, Article 69 decisions are not indexed, making research impossible; (2) statements of findings and reasons are not required; (3) there is no requirement that material contentions of counsel be addressed, as the Code requires for field reviews; (4) the duties of military defense counsel are unclear; (5) there is no express provision for hearings where appropriate; and (6) there is no provision for a verbatim transcript. These deficiencies become even more urgent if the correction boards lose jurisdiction to review courts-martial.

If you believe the rights of an accused are diluted, please explain in what areas and why you feel those changes should (or should not) be made.

> The ACLU opposes any dilution of the procedural safeguards afforded to the accused. This includes a number of provisions in each bill, as discussed above and in our prepared testimony. We have endeavored to offer recommendations that would reduce the adverse impact of certain of the proposed changes. For example, while we strongly believe that all court-martial convictions should be appealable to some appellate court, we have suggested the use of certified military judges for reviews in the Offices of the Judge Advocates General as an improvement over the present arrangements.
>
> Congress should be adding protections, rather than taking them away. For this reason we favor measures such as extension of the certiorari jurisdiction, tenure protection for and interservice assignment of court of military review judges, and inclusion of public members on the Code Committee. Finally, the ACLU favors improved retirement benefits for the Court of Military Appeals as an indirect means of bolstering the stability and independence of that tribunal.

8. Reaction of Commanders

The General Counsel of the Department of Defense testified last week that "the primary responsibility for the administration of justice rests with the military commander." In your view, is there anything in these proposals which would dilute that responsibility? More specifically, do you believe that commanders would look favorably on the modifications to their role in reviewing cases before and after they go to trial? If so, why? If not, why not?

> Withdrawal of the jury selection function or duty to examine legal issues diminishes the role of command. As far as the possible reaction of commanders to changes in their role is concerned, the ACLU has no information on which to base an opinion.

In light of the changes being proposed concerning the responsibilities of these military commanders, do you believe they would be less likely or more likely to exercise their remaining authority (in reviewing cases after trial) on behalf of the accused? Please explain.

> The ACLU is not in a position to say whether the proposed changes in the role of commanders would render those officers less or more likely to exercise their remaining powers in a way that benefits the accused. Intuitively, we see no connection between the reduction of post-trial powers and the exercise of the powers left intact.

9. Independence of Judges in the Military

Are you satisfied with the independence of military judges? Are they sufficiently sheltered from any potential for command influence?

> Our response to Question 5 and footnote 20 on page 23 of our prepared testimony should be considered applicable *mutatis mutandis* to trial judges.

10. Defense Counsel Perspective

Some of this morning's witnesses have had experience as defense counsel in the military justice system. Putting on the hat of a military defense counsel what would be your reaction to the changes being proposed? More specifically, what is your reaction to the proposed changes concerning the following:

--the government's right to appeal

--the requirement for an accused to file a notice of appeal in order to get a verbatim transcript

--the changes concerning the role of the convening authority

--the expansion of the jurisdiction of the special court-martial

--military judge sentencing.

> We favor random juror selection and other measures that will distance the convening authority from the jury selection process and oppose permitting the convening authority to direct that a government appeal be taken, since that is a prosecutorial function.
>
> The position of the ACLU regarding the other items noted in this question is stated in our prepared testimony. The ACLU's position reflects the considered judgment of attorneys who have served as trial and defense counsel in various branches of the Armed Services.

11. Sentencing by Military Judges

Is the mark of a fair and equitable system of justice sentences which are largely consistent or sentences which reflect the circumstances of each case?

> The fairness of a system of justice must be judged by both of these criteria.

12. Military Justice Amendments of 1981

Last year the Congress approved several changes to the Uniform Code of Military Justice. From your perspective how are those changes working out? I would be especially interested in any comments you might have on the new rules for individual military counsel; as implemented have those rules worked to deprive certain accused of a meaningful right to select individual military counsel?

> The ACLU understands that the new individual military counsel criteria have not yet led to substantial litigation, despite the fact that they in some instances materially reduce the available pool of military attorneys eligible for appointment as individual defense counsel. If data obtained from the Armed Services confirm our understanding as to the effect of the new rules, the Committee should direct that the rules be changed. The Committee should directly obtain the views of the defense appellate divisions and field defense counsel with respect to this question.
>
> The ACLU's concerns as to the erosion of the right to individual military counsel are set forth in the attached comments which we filed with each of the Judge Advocates General following enactment of the 1981 Amendments. Among other things, we suggested that requests for individual counsel from another armed service be handled according to precisely the same criteria as would apply to a request for a lawyer in the accused's branch of the service. To the extent that this suggestion was not adopted (despite the fact that Congress declined to overrule *United States v. Johnson*, 23 C.M.A. 148, 48 C.M.R. 764 (1974)), the potentially critical right to individual counsel from another service has been narrowed. *See* MCM, 1969 (rev.) ¶ 48b(2), *as amended by* Exec. Order No. 12340, 47 Fed. Reg. 3071, 3073 (Jan. 22, 1982). The Committee may wish to ask each of the services to submit

an analysis of its individual counsel rules with specific reference to this and other suggestions made in our submission.

The ACLU is gratified by the Committee's interest in following up on the amendments passed last year. As suggested in our testimony, we hope the Committee will play an active oversight role with respect to changes in the *Manual for Courts-Martial*.

BEFORE THE
JUDGE ADVOCATES GENERAL

In the Matter of)
)
REASONABLE AVAILABILITY OF)
INDIVIDUAL DEFENSE COUNSEL)

COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

Introduction

On November 20, 1981, President Reagan approved Public Law No. 97-81. 95 Stat. 1085. Section 4(b) of that measure authorizes each of the Service Secretaries to promulgate a regulation defining "reasonably available" for purposes of the individual military counsel provision of Article 38(b) of the Uniform Code of Military Justice ("the Code"), 10 U.S.C. § 838(b) (1976), and to "establish procedures for determining whether military counsel selected by an accused . . . is reasonable available." "[W]hile recognizing the differences in the circumstances and needs of the various armed forces," those regulations are to be uniform "to the maximum extent practicable," and must be reported to the Committees on Armed Services of the United States Senate and the House of Representatives.

The American Civil Liberties Union ("ACLU") is the principal nationwide organization dedicated to the preservation of civil liberties. Among its many thousands of members are persons currently serving in the Armed Forces, and therefore subject to the Code. The ACLU has been active in expressing a civil liberties viewpoint in the military context for many years, and was the only civilian organization to present testimony concerning Public Law No. 97-81.

Standards

It is the ACLU's view that the 1981 amendment to Article 38 does not materially alter the focus of the determination concerning reasonable availability of requested counsel. The ultimate issue is, as it has always been under the Code, the factual question of whether a particular attorney is as a practical matter available to perform the requested services. This involves, in the ACLU view, a verifiable assessment of the particular officer's duty status, assignment to duty or responsibilities at any given time. Thus, for example, a request for (1) a retired officer, or one who was (2) hospitalized, (3) under instruction or (4) on extended leave, need not be filled. In the latter three cases, however, reasonable availability should be a function of (1) the duration of the officer's authorized leave, course of instruction or anticipated incapacity, (2) the gravity of the charges against the accused, and (3) the willingness of the accused to waive his or her right to a speedy trial.

Similarly, a request for a sitting judge of a Court of Military Review should not have to be met, since it is well, in our view, to maintain as much of a distinction as possible between those performing judicial functions and the trial bar. This rationale would also apply to those performing duty as general court-martial judges or full-time special court-martial judges. Mere possession of a certification to perform judicial functions, or the occasional performance of judicial duties, are not, in the ACLU's view, sufficient for this purpose; actual, sustained, current performance of such functions is a pre-requisite. For this purpose, we consider an officer actually serving as a military magistrate to be a judicial officer.

Other functions could properly be recognized in the new regulations as disqualifying. For example, lawyer officers assigned to investigative or law enforcement functions could reasonably be excluded as a class, as could officers assigned to duty as appellate government counsel. Officers assigned to duty as trial counsel exclusively could be excluded, but only where such assignments are made in writing prior to the submission of any request for the officer in question, and provided that such assignment is for a period of not less than 12 months.

We strenuously disagree with the notion that an accused may only request counsel certified under Article 27(b)(2) "who have met the special qualification and screening requirements to be assigned, at the time of the accused's request, to the Army Trial Defense Service," as suggested by General Clausen on page 12 of his prepared testimony before the Subcommittee on Military Personnel and Compensation of the House Armed Services Committee on October 14, 1981. In our view, it is sufficient that the requested counsel be "a graduate of an accredited law school or . . . a member of the bar of a Federal Court or of the highest court of a State" as provided in Article 27(b)(1) of the Code. If a person having such qualifications could serve as civilian counsel (which is clearly the case), he or she should also be deemed eligible for service as individual counsel. On the other hand, we perceive no basis for objecting to mandatory full disclosure to the accused that a requested attorney has not been certified under Article 27, or has not met the "special qualification and screening requirements" necessary for assignment to trial defense duties. If, knowing the facts, the accused persists in his or her request, the decision would have been knowing and voluntary.

The legislative history of Public Law No. 97-81 demonstrates that Congress rejected the notion of barring requests for counsel from an armed service other than that of the accused. Such a provision had been in the original measure offered by Senator Jepsen, but was deleted by the Senate Armed Services Committee at the time the Uniformed Services Pay and Benefits Bill (S. 1181) (to which these provisions were originally a rider) was reported out. For this reason, as well as the fact that such requests may well save the government money and ensure the independence and effectiveness of defense counsel in some circumstances, the regulations should in no way infringe the right to request counsel from another service. United States v. Johnson, 23 C.M.A. 148, 48 C.F.R. 764 (1974). Such requests should be considered on a nondiscriminatory basis with requests for in-service counsel. The standard for determining whether other-service counsel are reasonably available should be that set forth in the reasonable availability regulation of the service of which he or she is a member, rather than that of the accused's service. A member of the Army should have precisely the same opportunity to obtain a particular Navy lawyer as would an accused who is in the Navy.

The ACLU believes that Article 38(b) does not require an accused to show good cause for requesting individual counsel. Concerns over the independence of defense counsel gave rise to the individual counsel provision in the first place, and we believe it would be unwise to act on the assumption that such concerns are no longer relevant. We take this position with due regard for the various measures adopted to improve the guarantees that defense counsel will be independent of command; such measures are commendable and to be encouraged. They do not, however, furnish sufficient assurance to abandon the public policy underpinnings of Article 38(b).

Accordingly, the ACLU is loath to recommend the adoption of arbitrary limits on reasonable availability, such as geographical or command lines. If, however, such limits are adopted, they must be reasonable ones. Reasonableness in this context should be determined in a generous, rather than a miserly way. It must also be determined on the basis of whether, as applied, the limits have the effect of leaving the accused with an unreasonably narrow choice of counsel. Thus, a zonal or command concept might have to be adjusted to take into account the per capita incidence of judge advocates among zones; *i.e.*, a geographical limit that was reasonable where there are numerous available counsel might well be unreasonable where the choices are few.

The cumulative impact of the restrictions must not be unreasonable. Thus, a geographical restriction to a single state or standard Federal region, or to a single Fleet, Air Force, Army or equivalent, Naval or Coast Guard District or similar command area, coupled with a blanket exclusion of judge advocates not serving as defense counsel, might unduly narrow the field of eligible individual counsel. Under no circumstances should an accused's choice be restricted to lawyers stationed at a particular base, station, legal services office, district legal office, or the equivalent of any of these. The ACLU believes that any regulation that limited the choice to those serving under the same general court-martial authority as convened or could have convened the court-martial in question would be unreasonable *per se*. Any regulation that limits the pool of eligible judge advocates to fewer than 25 attorneys would also be unreasonable *per se*. Any stricter rule of thumb would thwart the Congressional policy that the accused have a "meaningful opportunity to select individual military counsel of his or her own choosing." S.Rep. No. 97-146, 97th Cong., 1st Sess. 21 (1981).

In a given case, a regulation that was reasonable on its face might operate in an unreasonable fashion. This, too, should be avoided. Thus, some allowance should be made in the regulations for cases in which a special need exists for the accused's chosen individual counsel, and we assume this is what General Clausen was referring to when he noted, on page 12 of his October 14 prepared testimony, that "actual trial experience" might be a factor to weigh in the availability determination. A lawyer with experience in homicide, espionage, or capital cases, or expertise in recognized areas of specialty such as international law, aviation, admiralty, or forensic medicine, might be reasonably available under circumstances where he or she could properly be deemed unavailable if the charge were desertion. We would, however, object to any a priori exclusion of young or relatively inexperienced officers; frequently these may be the most zealous of representatives, and therefore may offer the best protection against command influence. Obviously, a prior attorney-client relationship would also be a special circumstance justifying availability where the attorney might otherwise be deemed unavailable. This factor might be germane not only to zonal definitions but also with respect to the officer's caseload or other lawyer-specific obligations at the time of the request. Where a need for resort to the civilian courts is anticipated, a request for counsel entitled to practice in the court in question should be honored.

The same standards of reasonableness should be applied regardless of the accused's rank. In addition, while the ACLU strongly believes that military justice should be color-blind and gender-neutral, we recognize that minority and women servicemembers may feel that representation by a minority or woman judge advocate can be important to the presentation of an effective defense. The ACLU feels that such requests should be honored and the other factors defining reasonable availability relaxed where they would, if applied, either foreclose or unduly restrict representation by such counsel. The same considerations would seem to apply to requests for individual counsel with, for example, an hispanic background, where the accused has such a background.

Procedures

Finally, with regard to the procedures for determining reasonable availability, the ACLU strongly urges that detailed counsel be free to make such inquiry as to them seems proper with respect to the availability-in-fact of particular counsel as to whom an accused is considering submission of an Article 38 request. Such investigation may well save the government time and money, and reduce the need for sequential requests for individual counsel. Moreover, such informal preliminary investigation by counsel is plainly of a confidential nature, and should in no way be subject to oversight, control, channeling or monitoring by command or command legal authorities.

As we have indicated, the essential question that will be faced in any case in which an accused does not receive the services of an attorney requested under Article 38 is whether that attorney was available in fact. Accordingly, the Judge Advocates General could properly develop a standardized format for memorializing the facts upon which a determination of nonavailability is predicated. Such a form could list the cases to which the requested attorney was assigned, in what capacity, the anticipated trial dates, the level of court-martial, the number of witnesses anticipated, whether a guilty plea is expected, and the like. Such a contemporaneous record would facilitate review where the accused contests a determination of nonavailability.

Conclusion

The ACLU appreciates the opportunity to submit these comments. We request that we be furnished a copy of each service's reasonable availability regulation in proposed form so that we may comment further, if appropriate, as well as copies of any explanatory materials that may be developed with respect to those regulations, particularly to the extent that these address any "service-unique demands which justify any substantial non-uniformity in the regulations." S.Rep. No. 97-146, 97th Cong., 1st Sess. 21 (1981). We would also suggest that notice of the regulations be published in the Federal Register both before and after promulgation, and, if the proposed text is not so published, that the notice of promulgation solicit comments from the public, the bar and the military bar. In addition, comments should be solicited through service channels from the military trial and appellate bar, and made available to the public upon request.

Respectfully submitted,

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Senator JEPSEN. I appreciate your testimony and I have been advised by staff that you have been interested and helpful as well and I appreciate that.

Mr. FIDELL. I thank you very kindly, sir. It has been a pleasure and privilege to be able to work with staff and even more so to appear here this morning.

Thank you.

Senator JEPSEN. Colonel Douglass. Welcome and you may proceed.

STATEMENT OF COL. JOHN JAY DOUGLASS [RETIRED], ESQ., PROFESSOR OF LAW, UNIVERSITY OF HOUSTON, JUDGE ADVOCATES ASSOCIATION

Colonel DOUGLASS. Thank you.

I represent the Judge Advocates Association which, as you know, is a bar association of lawyers concerned with military law and the careers of military officers.

For your information, I think you know that I am a retired officer having served as a Post and a Staff and Theater Army Judge Advocate and as a Military Judge and Commandant of the School. Since my retirement I have been deeply concerned with criminal justice from the civilian side as the dean of the National College of District Attorneys.

We welcome this opportunity to come here, Senator, and talk to you about this proposed legislation. We encourage any system of military justice which will help the maintenance of discipline and also the protection of the rights of individuals.

Let me begin by saying, as almost every speaker has done, that we support an appropriate retirement system for the members of the court. We have watched for a long time the movement in and out of the court, the changes in personnel and we hope that some stability will be given the court by the changes you have already made and those in the retirement area.

I want to talk about, if I may, two or three items specifically which I have listed which we think deserve concern.

First of all, your suggestion for a substantive article in the area of trafficking, possession and use of controlled substances. Quite obviously there is a need for some change. Unfortunately, we in the association have not seen the proposal that is, we understand, soon to come from the President's office and to be an Executive order. We would suggest that after this is available that your committee look it over and make a decision. We like the idea of a substantive codal provision. However, we believe that it should be a fairly basic codal provision which provides some flexibility as time permits, as the situation develops.

For example, when I first went to Vietnam as the Army judge advocate we found that users of marihuana were being given almost routinely special court cases and special court sentences. We made a decision at an administrative level, at a judge advocate level that this was a waste of military personnel in all sorts of ways. We felt that soldiers ought to be soldiers and not in the stockade. So we urged, therefore, a change in that program to reduce those trials to nonjudicial punishment. We found that much more effective. We may have been wrong perhaps, but at least we made a decision.

I think if you are too definite and too firm in the way the substantive 112(a) that you propose is written, you may find that there are some problems which may later develop which tie the forces in too tight a situation.

There have been indications of dissatisfaction with sentences by court members. I am going back in my own history again because in 1969, just as the changes in the new code of 1968 were promulgated, I became a military judge and I suffered the slings and arrows of every commander because my sentences were not, in their view, strong enough. I was using my own judgment. Now I see the pendulum has swung, I think, a little and we are now saying, well, the court members, perhaps their sentences are not strong enough and they are being too lenient.

The problem of sentencing is that it is not a science, and no matter how long one has been a judge, and I see this in my civilian criminal area, his sentences are always decried as either being too lenient or too tough. The sentences are complained of because they are not uniform. Well, we are dealing not with the possibility of a science that all sentences should be the same. If we were to give everyone in this room a case today and let them hear all the facts and know everything they could possibly know, the sentences would not be uniform and some would give lenient sentences and some would be the hanging judges.

The point that I make is that I think it is not time to make this change that is suggested to take this away from the court. There are still some States, including my own, the State of Texas, in which there is a possibility of sentences by court members, by jurors, as it were, and we think that perhaps it is not the time to make the change.

I would point out that the analogy of the civilian court system is not always the same. We cannot completely place on top of our military court system the civilian court system. There is, and it should be remembered, the intervening convening authority who looks at that sentence after trial and hopefully that individual will provide some of the uniformity if that is a desirable effect on the sentences that are pronounced by courts as opposed to those pronounced by judges.

I would also point out, as have others, that there is a tremendous percentage of the cases that are now decided either by plea negotiation or are decided by judge alone at this point in time. So rather than make what I fear would be an irrevocable move, I think that there should be some more thinking on this subject and some more delay. I am not for delay per se, but I don't think this is the time yet to make the change in sentencing and taking it away from court members totally.

It seems to me that one of the most significant portions of this recommendation, both by your committee and by the Department of Defense is one that perhaps will not be given as much attention as it might, but it seems to me that you are changing an entire system of military justice in a sense. You are taking away from the commander the determination of legal matters. I have long suggested this. I have been a supporter of this move for a long time and I am glad to see it, but I think we should recognize what you are doing when you make this change.

There are going to be those who are later going to say you are taking away the rights of commanders. We know, those of us who have been in the business, that in truth commanders don't make legal decisions and they haven't for at least 20 years that I am aware of. They have been making discretionary decisions, the decisions you are going to leave to them. We recommend that you do make this change, but I hope everyone understands where we are really going.

I would, however, make a plea that we continue the written pretrial advice and the written post-trial review by a legal officer. I don't like the idea of people making mental, oral determinations on what the law is. I like to see them down in writing.

Quite frankly, there is probably no better training ground for a new lawyer, and a new lawyer in the services, than to be required to write a review for his staff judge advocate or a post-trial review for his staff judge advocate. I think these are disciplines that are necessary.

I think Judge Everett spoke about some kind of a check list. I think that lawyers' use of check lists is not the most appropriate way to make legal determinations, and I would hope that at least somehow at least administratively perhaps that the services would require something in writing or which there is an analysis of the law and the evidence before trial.

Mr. **Principi**. Colonel, the vast majority of cases are tried by special courts-martial, I would believe, and there is no requirement for a legal writing of pretrial advice in that case, is there?

Colonel **Douglass**. That is correct.

Mr. **Principi**. Should there be in view of your comments?

Colonel **Douglass**. Well, I am concerned now about felony trials, and I have, frankly, for a long time looked at the special court as a place for nonfelony trials. I recognize that we try felonies now in the special court, but at least for those cases in which we are going to be considering with long-term confinement.

I think it would be a terrible thing, for example, to try a capital case and never to have had anything written about the legal evaluation of the evidence. Granted that I would go back this far. Perhaps I would go back to the special court and make such a requirement, but we know that many special court convening authorities do not have legal advisers, particularly in the Navy. So this would be placing an undue burden on them.

Mr. **Principi**. There is no requirement in the law today for a pretrial article 34 advice in writing, is there? Article 34 does not direct a written pretrial advice. It could be oral or it could be in writing.

Colonel **Douglass**. I know, but we know as a practical matter that every referral to a general court is preceded by a pretrial written advice.

Mr. **Principi**. I agree with you that that would be a policy decision by the Judge Advocate.

Colonel **Douglass**. And that is all I am suggesting. I am just throwing this in I hope for somebody listening back here.

Mr. **Principi**. The fact is that S. 2521 does not have it in their bill.

Colonel **Douglass**. No, I am not suggesting you put it in writing. This is an aside and I hope the people in the back of the room are listening.

Mr. **Principi**. Thank you.

Colonel DOUGLASS. Let me talk about the waiver of automatic review, and I must say, as you can see from my paper, I really am not very enthusiastic about the waiver of the automatic review.

I think there is a perception that this is one of the rights granted to an accused. I think it is a perception that should be continued. I am not convinced that you are going to really save anything. I am not convinced in my own mind that if I were a defense counsel I wouldn't have prepared a piece of paper which I would automatically hand to the accused in which he asks for a review. And particularly I think it is inappropriate to ask a defense counsel to advise an accused before he has ever seen the record of trial whether he is going to make a review.

Now I know that you have said in both the proposals that there be a 10-day period and then we can extend that 30 days and so forth, but I don't think that is appropriate. If I am a defense attorney of any consequence at all, I am going to be able to find some sort of matter that I can at least bring forward. We know in the civilian community today that any defense counsel who does not recommend an appeal is in very dangerous ground. He is in the area of being proclaimed incompetent. I am not convinced that this is going to be any saving at all. I think you are just going to get into more and more litigation and, frankly, I think you are going to get just as many cases as you now have.

Certainly I can agree that there may be some provision for a waiver after a certain period of time, and I know there are frivolous appeals made. Eighty-five percent of the guilty pleas in the State of Nebraska are appealed. Well, we know this is ridiculous. We know that the courts are full of frivolous appeals, and I am not talking about the Courts of Military Review. I am talking about the Appellate Courts of this country and there are some actions that have to be taken. I think that perhaps some commissioners might well look over the cases that are appealed to the Court of Military Review, some sort of administrative reduction of these, but I cannot recommend at this point in time that this be done.

Peremptory challenges. I suppose my suggestion to you comes from a strange area in which I say that the prosecutor gets only half of the peremptory challenges that are recommended for the defense. I certainly would oppose three challenges per side. I am convinced that peremptory challenges in large part in the military is game playing in any event. It is to try to get the numbers down so that the two-thirds, and you were just talking about this with Mr. Fidell, to get the two-thirds or the three-fourths down to the right number so that you get that game you are playing in correct form.

If you are going to tell the prosecutor, for example, that he has three challenges and the defense three challenges, who gets them when? Under the present code the first goes to the prosecutor and then to the defense side. But are you going to continue this that he has to take his three first and his three, or can he take one and then two and then one more? Are we going to play all sorts of games with it?

Frankly, I don't think there is a bias. Watching 30 years of trials via court-martial, I don't think there are biased court members in the amounts that it has been alleged. But if there is and if this exists, I think you can solve this problem with a single peremptory challenge by the prosecution, by the trial counsel, if you will, and two by the defense.

No one else has mentioned the provisions about the general and flag officers, and I throw this in perhaps as maybe not being a very major point. I would oppose not having an automatic reivew of cases involving general and flag officers. There have been so few. We are talking about minuscule amounts that go forward. There have been so few of these. But this is a very peculiar community and I would like someone outside the system looking at any case, and I think the Court of Military Appeals and the members of that court are an appropriate body to do an automatic review of any case in which a general or flag officer is involved. I think this is perhaps something that others may not have considered as important as I do.

On the question of review by the Supreme Court, when the American Bar Association in 1979 made its recommendation, which they now support, if you will read the committee report, which was the basis for it, they pointed out at the time that this has symbolic value. It seems to me that symbolic value decisions are not of great moment in the kinds of problems we have in the world today.

What you are really doing, it seems to me, and I am surprised that Mr. Fidell supports so strongly this proposal, is you are really giving an appeal to the Government, to the Supreme Court of the United States. I am convinced that very generally speaking, and I recognize there are some problems, but very generally speaking the defense can now appeal to the Supreme Court in an appropriate case by collateral means I realize through habeas corpus. But there is almost no way that I can conceive that the Government could ever appeal a decision of the Court of Military Appeals. That is all you are really adding. It seems to me that I would have difficulty thinking of a case in the past years that the Government would have succeeded in getting certiorari to the Supreme Court.

Finally, I would say in this matter of certiorari that we have long agreed in setting up this system that there be a supreme court for the military justice system. That supreme court, the serviceman's and servicewoman's supreme court is the Court of Military Appeals. Let there some place be finality. If there is any problem in the American appellate process in 1982, it is the lack of finality. The Chief Justices of the Supreme Court have said this over and over again, as have every other commentator in this area. Let there be finality and now at least let it stay where it is.

I have made some other comments that are technical in nature. Let me say that I hope it is not inappropriate for me to echo the words of Mr. Hunter and to recommend to you that you provide a statutory base for legal assistance.

I welcome the opportunity on behalf of the association to be here. We hope that we an continue to work with this committee and the rest of the Congress in any effort they make to improve the criminal justice system.

I would be happy to try to answer any questions.

[The prepared statement of Colonel Douglass follows:]

PREPARED TESTIMONY OF COL. JOHN DOUGLASS TO THE ARMED SERVICES COMMITTEE ON AMENDMENTS TO THE UNIFORM CODE OF JUSTICE BY THE JUDGE ADVOCATES ASSOCIATION

I am Col. John Jay Douglass, retired, representing the Judge Advocates Association. We welcome the opportunity to comment on S. 2521, the Military Justice Act of 1982 and the proposed legislation forwarded by the Department of Defense on this same subject.

The Judge Advocates Association is a bar association for lawyers concerned with national defense, the military justice system and careers of military officers. It was organized in Washington, D.C., in 1943 as a nonprofit corporation composed of lawyers who are serving or have honorably served in any component of the Army, Navy, Air Force, Marine Corps, or Coast Guard. The Judge Advocates Association is affiliated with the American Bar Association.

I am a retired Regular Army judge advocate, professor of law of the University of Houston, at present dean, the National College of District Attorney's and the delegate to the House of Delegates of the American Bar Association from the Judge Advocates Association. I have served as the Judge Advocate of U.S. Army, Vietnam, as a military judge and for the 4 years prior to my retirement as commandant of the Judge Advocate General's School, Army, located at Charlottesville, Va.

The association's deepest concern is the sound development of military law and the establishment and maintenance of an efficient military justice system. The membership of the association considers itself the bridge between the legal community and the military community. We encourage a system of military justice which provides not only for the maintenance of discipline but for the protection of the rights of military personnel within the highest traditions of both professions. We believe it is important that any changes in the military justice system be such that they are effective both in peace and war, in the United States and in the territories in other nations. We, further, believe any changes should be applied uniformly throughout the Armed Forces of the United States but with sufficient flexibility to accommodate the unique requirements of the ground, air, and sea services.

The association endorses wholeheartedly the provisions in the Jepsen bill which provide an adequate and appropiate retirement system for the members of the Court of Military Appeals. The association has noted with concern the personnel changes on the court during the past 10 years. The short tenure of a number of the members of that court and the long periods when the court was understrength has been particularly disturbing. We are convinced that the quality and the tenure of the court is exceedingly important in the development and maintenance of an equitable, just, and effective criminal justice system for the armed services. Amendments in the law in the past 2 years have been helpful in this regard but to complete the package we believe very strongly that the members of the court should have a retirement system comparable to that provided for other judicial officers of the United States.

A number of the recommendations in the proposed legislation particularly in the bill offered by the Department of Defense, are administrative corrections which might be well termed housekeeping matters. The importance or the need for these administrative corrections are perhaps best determined by the legal personnel currently involved in the administration of the Uniform Code of Military Justice. A number of the matters, however, are of more far reaching impact and deserve analysis and consideration by both the military community and the legal profession before becoming finally enacted into law. These matters include the addition of a punitive article on drug offenses or controlled substances; the transfer of sentencing authority including the authority to suspend sentences to the military judge; a change of the function and responsibility of the convening authority in referral of charges and in the post-trial review of findings and sentence; the elimination of mandatory review by the Court of Military Review of certain classes of cases; the change in the number of peremptory challenges in general courts-martial; and the authorization for review of Court of Military Appeals decisions by the U.S. Supreme Court. These matters deserve analysis and consideration not only from the point of view of the immediate result but the long range effect that such changes may have on the administration of military justice in the services.

There is a need for clarification and simplification of the Code as it relates to the use, possession and trafficking in controlled substances. The present dichotomy between articles 92 and 134 is unsatisfactory. This is particularly important today, in view of the concern of all services for the abuse of drugs by personnel of the services. Although the proposed DOD bill does not include a substantive article on punishment for the use, possession or trafficking in controlled substances, the Department has in the works a change in the "Manual for Courts-Martial" which the Department believes will accomplish the necessary simplification and correction of the problem. It is understood that the Manual change envisioned by the Department of Defense as an Executive order of the President will become effective on or about October 1. This proposal was not available to the association and therefore we cannot comment upon its effectiveness in resolving the problem.

The association is in full accord with the philosophy expressed in the Jepsen bill of providing for punishments for the use, possession, and trafficking of controlled substances. The substantive article should follow the format of other substantive articles in the Code in setting out a basic prohibition against use, possession and trafficking with the sentences for violations to be covered in the Table of Maximum Punishments. Any substantive article should provide sufficient flexibility to add (or delete) specific controlled substances without requirement for these substances to be set out *in haec verba* within the Code or require reference to other statutes. There needs to be sufficient flexibility in any statutory provision to provide for the inclusion of new substances which may be subsequently developed which are mind-disturbing and are detrimental to discipline in the Armed Forces. The association recommends that the committee review the Executive order after promulgation to determine whether current objections are resolved. If not, a definitive substantive article should be included within the Code which does not require reference to other Federal statutory provisions which may or may not be available, particularly under field conditions. It is further recommended that the statutory provision be flexible enough to permit the maximum punishments to be determined by Presidential order rather than to be included within the statutory language.

Expressions of dissatisfaction with sentences by court members has lead to a recommendation for an amendment which would remove the sentencing authority from the court and place it entirely in the hands of the military judge. Such dissatisfaction may be based either on the leniency of court members or perhaps on the lack of uniformity of sentences imposed by courts. It is well to take a historical look at this problem. Following the very significant changes in the Code in 1968, judges were authorized to sentence in cases for which they sat alone. There was uniformly great dissatisfaction in the services with sentencing by judges. The pendulum has swung in the opposite direction. The Criminal Justice Standards of the American Bar Association and the various judicial groups commend sentencing by judge and not by jury. Some of those most adamant in the need to take away sentencing powers from the courts are at the same time unwilling to make military judges complete judges by authorizing them the authority to suspend sentences. At this time judges, in fact, do sentence in the majority of cases as a result of the trials held before judge alone. Additionally, many sentences are the result of negotiated pleas of guilty. The time has not yet arrived to eliminate sentencing by the court from the military justice system in that limited number of trials still heard by the court. The case is not so crystal clear for judge sentencing that a change should be made which might well be irrevocable. There is still a place in trials by courts-martial for the view point of the military community on appropriate sentencing.

A change of consequence perhaps not fully appreciated in both the Senate bill and the Department of Defense proposal is the elimination of the authority and responsibility of the commander to make certain legal determinations. The provisions which relieve the convening authority of the responsibility for determining legal sufficiency of the charges and the lawfulness of the jurisdiction and determination of the legal sufficieny of the findings and sentence following trial is a major development. For the first time in the history of military justice the non-legally trained commander is relieved of making legal decisions and the questions of law are placed solely in the hands of the judge advocate. The convening authority does retain that important portion of the prosecutorial function involving the discretionary decision as to whether charges shall be referred to trial and the discretionary authority following trial to sustain or reduce the findings and to determine the sentence. These important discretionary functions which remain with the commander are not to be based on legal considerations but on personal and command concerns. The critics of the Uniform Code of Military Justice have long objected to the determination of legal questions by a commander untrained in law. Many of us who have practical experience understood that, in truth, commanders have not exercised legal decisionmaking authority but have left these questions to the acumen and judgment of the judge advocate. These proposals will place in the hands of individuals trained in the law the questions which are law-related and the questions of discretion in the hands of the convening authority. Until the judge advocate opens the gate and makes a positive legal determination, the commander will be precluded from exercising his discretion. This statutory change will go far to remove the perception that nonlegally trained personnel are making legal determinations and for that reason alone such change should be made.

I cannot conclude comment on this matter however without a personal plea for the continuation of written legal pretrial and post-trial advice. This is a needed discipline which should be imposed on the judge advocate to make certain that he is in fact making correct legal determinations. Experience indicates that there is probably no better training in the military justice field for a newly commissioned lawyer than to prepare a pretrial advice or a post-trial review.

Both the Senate and Department of Defense proposals provide for waiver of the present automatic review by the Court of Military Review in certain cases. It is assumed that this proposal is based upon a desire to reduce the workload of the Court of Military Review in the belief that many cases will be waived either under the inaction provision of the Senate bill or the express waiver provision of the Department of Defense bill. Fortunately both proposals do provide in the event of waiver for legal review bp judge advocates. It is our view that the proposals will not in fact reduce the workload of the Court of Military Review and may result in an increases in litigation. Any defense counsel worth his salt will hesitate to recommend to an accused that he waive the right to a review of the record of trial particularly when that review is a gratuitous one. This proposal may invite litigation for the failure of defense attorneys to recommend appeal will result in allegations of incompetence of counsel. The requirement for a decision on this mater so shortly after trial before counsel has had an opportunity to read or study the record appears to be somewhat foolhardy. Most defense attorneys will soon have a standard form prepared for immediate submission asking for the required appeal.

To enact this change will signal to the public a denial to an accused in the military system of what has long been viewed as a fundamental right. This perception will not balance out any small savings which might possibly accrue. The Courts of Military Review will be better advised to establish a screening commissioner and thus seek to reduce its workload. To streamline procedure in this fashion does not appear warranted or effective.

The Senate bill proposes to increase the number of peremptory challenges in trials by general courts-martial from one to three per side. The Standing Committee on Military Law studied this question in 1979 and recommended a change to increase from one to two the number of peremptory challenges. This recommendation, according to the report of the committee, was based on complaints that selection of court members may reflect a bias toward the prosecution. The committee admitted the additional administrative burden from this increase. If there was to be an administrative burden for two additional peremptory challenges, this burden would be multiplied by adding four additional challenges. If indeed a problem exists, of which I am not convinced, consideration must give to the timing of peremptory challenges by both sides. If all prosecution challenges are to be utilized, followed by defense challenges, as is normally the case in trials by courts-martial, this may well get into a game of selecting the correct fractional number for determining voting procedures in a court process in which guilt or innocence is determined by less than unanimous vote. Consideration might be given to following the philosophy of the federal rules and grant one peremptory challenge to the prosecution and two to the defense. Thereafter, the problem of additional challenges could be left as a matter of court rule to the military judge. At a time of criticism of the jury selection delays in civilian criminal trials, it is not appropriate to add this difficulty to military courts-martial.

Perhaps only a minor recommended change is the elimination of automatic review of cases involving general or flag officers. This should however, be reconsidered. This has been suggested to eliminate any indication of special concern for this class. There are grounds for justifying an independent review of a case involving a general and flag officer. Courts-martial of general and flag officers are referred to trial by other general or flag officers and general or flag officers will review the record, making discretionary decisions following trial. The automatic review in the Courts of Military Review can be eliminated, but it does seem wise that the trials of general and flag officers be reviewed by the Court of Military Appeals as a fully independent judicial body.

Review by the U.S. Supreme Court of decisions of the Court of Military Appeals was recommended by the American Bar Association in 1979. This, in effect, places the military accused on a par with others in the criminal justice systems of the United States. The American Bar Association's action arose from a recommendation of the Standing Committee on Military Law. Interestingly that committee recommendation contained the comment that the certiorari jurisdiction should have symbolic value, and it was stated that the recommendation came as a result of proposals at that time from certain highly placed persons that the Court of Military Appeals be abolished and its power transferred to other tribunals. The committee noted that the Court of Military Appeals is worth keeping and its decisions should not be appealed to another Federal court of appeals. It was for that reason that the recommendation was made to support appellate jurisdiction in the U.S. Supreme Court.

An accused can make a collateral attack in a Federal district court and thus eventually take an appeal to the Supreme Court of the United States. The affect therefore of granting a right of certiorari jurisdiction will be to make available to the Government a right of appeal to the Supreme Court. One is hard pressed to determine any cases in which the Government could have successfully sought certiorari to the Supreme Court of the United States from the Court of Military Appeals.

In the light of the reluctance of the Supreme Court to accept additional jurisdiction and further in the light of the limitation of the proposed grant to those cases which have already been decided by the Court of Military Appeals, this proposed change in the military justice system does not seem to us either practical or wise. The U.S. Court of Military Appeals has the strong endorsement of the organized bar and is the "serviceman's supreme court." Let it remain so.

Finally, let me refer to what I believe is an inconsistency between article 27 and article 6 as they are proposed to be amended. Under the amendment to article 27 a trial counsel or defense counsel must be a judgge advocate "who is a graduate of an accredited law school." This provision is not in article 6. Attention is also drawn to proposed changes in article 67a2 which would deny the right of the President upon notice and hearing to remove judgges of the Court of Military Appeals for mental or physical disability. This is to be an appropriate action for the President. Finally, I recommend that article 71A be rewritten to make clear that the President may not suspend a death sentence but he is authorized to reduce sentences and to suspend any part of the reduced sentence.

The Judge Advocate Association is pleased to have had the opportunity to comment on the proposals for change in the Uniform Code of Military Justice. We remain available to assist the Congress as well as the services in improving this very important part of our national security system.

Senator JEPSEN. I have one question and others for the record, but because of your representation of your association and so on, I want to make sure that I understand how you feel about what we are doing.

You indicate on page 3 of your statement that "A number of matters deserve analysis and consideration by both the military community and the legal profession before becoming finally enacted into law."

My question is do you agree that we are doing that and that is the purpose of these hearings?

Colonel DOUGLASS. Yes, and I'm pleased that the American Bar Association and representatives of the ACLU are here and our Association and others. It is poorly articulated. I guess I am really saying we are delighted that you are taking us into consideration in this matter and that is our approach to that problem. We would be glad to help in the future or to participate in the future in any way we can.

Senator JEPSEN. I thank you for coming and I thank you for your interest and I thank you for your testimony. Houston, Tex., is a little ways away. In the jet age it doesn't take long, but it still is a distance. Thank you for coming.

Colonel DOUGLASS. Thank you for having me.

[The questions submitted and answers supplied follow:]

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John Jay Douglass
Dean

Robert S. Fertitta
Associate Dean

September 28, 1982

Honorable Roger Jepsen
Chairman, Subcommittee on
Manpower and Personnel
Committee on Armed Services
United States Senate
Washington, D. C. 20510

Dear Senator Jepsen:

In answer to the additional questions following my testimony on behalf of the Judge Advocate Association before your subcommittee on S 2521 and the DOD draft legislation "Military Justice Amendments of 1982" the following is submitted:

> Colonel Douglass, on pages 5 and 6 you stated that, in fact, in the majority of cases judges are determining the sentences or that many sentences are the result of pretrial agreements. You admit that only limited number of accused are in fact sentenced by jury. Your tone seems to condone this development and support the professionalism of the military judge. However you then make the gigantic leap to the conclusion that "the time has not yet arrived to eliminate sentencing by the court from the military justice system." Please explain to the committee your justification for this unexpected conclusion. When will the time arrive?

Answer: I support the extension of the sentencing authority of the military judge. The findings and sentence authority granted to the military judge in the 1968 amendments to the UCMJ have been widely utilized by accused and are now considered to have been valuable and wise changes. For the first few years following the amendments, there was dissatisfaction with sentencing by military judges but with experience, judge sentencing in bench trials has become acceptable to the military community. It is only in "jury" (court-member) trials that the military judge does not have sentencing authority. In those cases, the military criminal justice system has an input from a broader based portion of the military community. More particularly, in view of the fact that military judges may not be stationed within that military

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community (or even from that service), sentences imposed by courts in a small percentage of the cases will provide local guidelines. Until the military criminal justice system has become more fully professionalized with pre-sentence investigations, a longer tenured judiciary and while the sytem retains a large measure of command concern, no change should be instituted. If in the future, the disciplinary functions are more distinctly separated from the felony crime area, reconsideration might be given to removing the non-lawyer input in the sentence structure.

Punitive Article In Connection with Controlled Substance Offenses:

If there is a change to the Manual for Courts-Martial in the works to deal with the problem of controlled substances, why is it necessary to enact a separate punitive article? Doesn't the provision in law reduce the flexibility of the President and military services in dealing with these offenses?

Answer: As the Association has not had an opportunity to review the proposed changes in the Manual for Courts-Martial dealing with controlled substances, it is not possible to pass judgment on the efficacy of this measure. It may well be that a separate punitive article is not necessary. It must be recognized, however, that statutory guidelines for the punishment of use, possession and trafficking in controlled substance may provide guidance to the Executive and the Departments on government policy without endangering the flexibility which is be necessary in dealing with this problem. Any substantive legislation should not be so precise as to put the system into this same posture in the future as if now finds itself.

Judge Sentencing and Suspending:

Has the Association gathered any data to support the contention that sentences by juries are more lenient or less uniform that those imposed by judges?

Answer: The Association does not have statistics or data on the question of jury leniency and lack of uniformity in sentencing. A certain lack of uniformity between installations and services may be no less justified than similar lack of sentencing uniformity between jurisdictions with dissimilar environment in the civilian sectors Statistics in such matters are suspect anyway, because the accused who choose between a bench trial or by jury often do so because of differing factual environments.

Does it make sense to have a system where judges have the power to suspend sentences even where they do not have the power to impose a sentence (e.g. in the case where the jury is sentencing)?

Answer: The question as to whether a judge should be able to suspend sentences in those cases where they do not have the power to impose a sentence tends to ignore the fact that at this time the military judge has no power to suspend sentences even in those cases wherein the military judge can impose sentence. Assuming that the law were to be amended to permit judges to suspend sentence imposed by them, it does not necessarily follow that they should have the same authority when sentence is imposed by the court. However, when sentence is imposed by the court, the power of suspension can be exercised only by another non-legally trained individual, the convening authority. This fact may well be a reason to grant suspension authority to the military judges in court imposed sentences if he has it in judge imposed sentences. Grant of such authority would permit both the legally trained and lay personnel to participate in the sentencing system.

The more fundamental question is whether the military judge should have suspension authority under any circumstances. If the military judge is to be granted this authority, action should be taken to provide a more through background investigation of the accused for the military judge than is now available. In the alternative, a request for suspension by the accused might include a hearing to provide information to the military judge. The present limitation on suspension authority to the convening authority can be justified on the availability to the convening authority of in-depth background on the accused and a longer period of time after trial and before final action to weigh such data.

Role of the Convening Authority:

In your view, is the convening authority less likely to exercise his post-trial powers, especially with respect to a finding, if he will not receive a legal opinion from his staff judge advocate? If not, why not?

Answer: In my opinion, the availability of a legal opinion from the staff judge advocate will have little impact on the exercise of post-trial powers by the convening authority. Over a period of many years experience as a staff judge advocate dealing with convening authorities, there were few occasions when the written legal aspect of my opinion had significant weight on the action of the convening authority. If the staff judge advocate has the confidence and respect of the convening authority, the opinion and recommendation of the lawyer will be accepted. Only in those cases where the staff judge advocate's opinion is equivocal or unclear has the written advice or review been of importance. The spirit of the law has always been to encourage a confidential relationship between the two. It is unfortunate that the cases wherein the legal opinion may have had the most influences were those where emotions were highest.

In sum, the non-lawyer convening authority looks to the non-legal portions of the advice or review to determine his actions and most often will accept without argument the legal determination of his lawyer.

Yours truly,

JOHN JAY DOUGLASS
Dean
Col., JAGC, Ret.

Senator Jepsen. Mr. Honigman from New York, you may proceed.

STATEMENT OF STEVEN S. HONIGMAN, ESQ., CHAIRMAN, COMMITTEE ON MILITARY JUSTICE AND MILITARY AFFAIRS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. Honigman. Mr. Chairman, my name is Steven S. Honigman and I appear on behalf of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York.

The bar association and the committee and I, myself, appreciate this opportunity to offer our comments regarding the important proposals for amending the UCMJ that are now pending before the subcommittee.

As many of the other witnesses have noted today, we are fortunate to have in the main a military justice system which now works well and equitably. Yet, in our view, both S. 2521 and the bill submitted by the Department of Defense contain many provisions which merit a prompt enactment into law. However, we do not support every one of the proposed amendments and, in our view, neither of the pending bills include a number of improvements to the military justice system that are worthy of attention at this time.

Mr. Chairman, in accordance with your admonition to be brief, I will merely highlight some of the points made in my prepared text and primarily address those of our proposals which are not included in the pending legislation.

First, Mr. Chairman, we urge that the provision for direct and discretionary review by the Supreme Court of decisions of the court of military appeals be adopted. In brief we believe that permitting such an expeditious appeal of decision of the court of military appeals will enhance the fundamental fairness and the efficiency of the military justice system.

While we appreciate the considerations of docket congestion which prompted the restriction of the Supreme Court's jurisdiction to those cases actually considered by the court of military appeals, we believe that it would be appropriate to require that the court of military appeals grant the petition to consider a case where one judge of that court finds that the petition for review has merit.

As both the Department of Defense bill and S. 2521 recognize, promoting the finality and the predictability of appellate interpretations of the code is an important goal. We believe that a major step toward achieving that objective would be the expansion of the number of judges of the court of military appeals from three to five.

It seems inevitable that changes in the membership of a three-judge court, any three-judge court, will lead to instability and uncertainty in the law. The unsettling effect of a single new member would be far less pronounced upon a five-member court than the possible effect of the replacement of a single judge upon the court of military appeals now with a potential for disorder and lack of understanding in the administration of military justice in the field when the court shifts its jurisprudential philosophy.

Mr. Chairman, for reasons of fairness and in order to promote longevity of service by the judges of the court regardless of the size of its bench we support the retirement provisions provided by S. 2521.

We also submit the proposed amendment, which would allow a court of military review as a whole to reconsider the decision of an individual panel of that court.

It appears that such en banc consideration would promote uniformity of appellate interpretation at the court of military review level within each service and it might also reduce the need for consideration of cases by the court of military appeals to resolve conflicts among particular panels of the lower court.

In addition, consistent with our recommendation that the courts-martial itself be empowered to suspend all or a part of the sentence imposed, we believe that power should be granted to the courts of military review in view of their appellate mandate to review the appropriateness of the sentence below.

As noted earlier, the article 67 Code Committee performs an extremely valuable function by surveying the operation of the Uniform Code and reviewing amendments to the Code proposed by the Military Joint Service Committee on Military Justice.

We believe that membership on the Code Committee should be broadened. As evidence in part by today's testimony, members of the civilian bar, many of whom like myself have served with the Armed Forces, have a strong and continuing professional interest in military justice. Yet, we often find it difficult to join with our military brethren in assessing the operation of the military justice system and in formulating appropriate amendments to the Uniform Code.

In our view the administration of military justice could benefit from participation by the civilian bar on an institutional basis. Moreover, the public's perception of the military justice system as fundamentally fair would be enhanced through such participation by civilian representatives. Accordingly, we recommend that article 67 be amended to include three civilians as members of the Code Committee.

We certainly agree that busy commanders should be relieved of unnecessary administrative burdens. Among those burdens are the personal designation of military judges and counsel and personally excluding members from service on courts-martial.

In another important respect, which is not addressed by either of the pending bills, the commander should be relieved of an additional administrative burden, that of the personal selection of members of the courts-martial jury under article 25(d)(2). Perhaps no other element of the Uniform Code contributes as strongly to the perception and possibly at times the reality of unfairness as the fact that the same commander who personally decides to invoke the military justice system also selects the jurors who determine guilt or innocence and impose the sentence.

This specter of command influence over courts-martial proceedings should be eliminated. In its place we recommend that members of courts-martial be chosen at random from a pool of eligible individuals.

As a separate proposal we also recommend that the pool of potential jurors be expanded. In our view, all petty officers or noncommissioned officers above a certain pay grade, and we believe the pay grade of E-4 and above would be an appropriate benchmark, and who have never themselves been convicted of a offense by courts-martial should be eligible for military jury duty.

Senator **Jepsen**. You have prompted a question that I would like to ask at this time. Given the unlikelihood of a change to the current jury selection process and your concerns that you just expressed, how do you reconcile your position on sentencing by judge alone and that of command influence?

Mr. **Honigman**. Mr. Chairman, I agree with you that it is probably unlikely that the military jury system will be changed as I suggest in the near future. I would point out that in past years the Comptroller General of the United States has suggested a similar change. But I certainly would argue that if the present blue ribbon panel is retained that it makes all the more sense to retain the sentencing function in the military jury.

I believe very strongly that command influence may be stronger when it is focused upon a single individual such as a military judge and is likely to be dissipated when the decisions are made by a panel on a military jury.

Mr. **Principi**. If the judge does not belong to the same command as the jurors and the chain of command is totally separate, how could command influence exist with respect to the judge?

Mr. **Honigman**. Through a practice that I suppose was once described as jawboning. Certainly if a commander would seek to suggest vigorously his views to a single individual, that might have an influence. The commander may well have influence or acquaintance with the commanders of the military judge even if there is a separate chain of command.

I address in my remarks the question of whether expanding the jury pool, as we suggest, would lead to unjust acquittals. I think those remarks probably speak for themselves.

If I can turn for a moment to the question of judge alone sentencing, we don't believe as a committee that there is a persuasive rationale for imposing mandatory judge along sentencing. We think that the traditional right of the military accused to call upon the experience, the operation experience and perspective of a military jury should be retained, and we are concerned that a change in this regard may well be perceived by members of the military and the civilian community as the elimination of a valuable right.

Even though there is a meritorious argument that sentencing is a professional function and military judges are professionals who are certainly qualified to exercise that function, if the military accused seeks to have the benefit of a professional approach to sentencing he is free to choose that approach. But we believe that there is certainly a very strong argument for allowing the military jurors to continue to speak for and to express the norms and the expectations of the military community in a way that the military judge, who is not an operational officer, may not be able to do.

Furthermore, we believe that the availability of military juror sentencing can serve as a valuable check or balance upon a military judge who imposes excessively harsh sentences.

Now I know there was some question earlier about whether an approach to judge alone sentencing or jury sentencing would be intended to encourage lenient sentencing. That is not our intent, but we do believe that military jurors can, and do, and should express the norms of the military society with regard to offenses.

If a military accused will consistently shy away from sentencing by a military judge and throw themselves upon the military jury and the military jurors' expression of those norms, we believe that that situation may be instructive to the judge. The judge may rethink his sentencing philosophy and he may change it to become more consistent with the expectations of the military society itself.

Senator **Jepsen**. Before we leave that, you are somewhere I am guessing from the subject matter at around page 9, 10 or 11. On page 10 you have mentioned, and I quote, that "One of the cornerstones of our jurisprudence is the role of the jury in expressing and applying the ethical norms of the community."

Mr. **Honigman**. That is correct, sir.

Senator **Jepsen**. Would you please explain to this committee how the civilian jury expresses and applies the ethical norms of the community when they virtually never get involved in the sentencing aspects of the trial?

Mr. **Honigman**. Well, it performs that role in arriving at its determination of guilt or innocence. Conceivably in some situations a verdict of innocent can be taken as an expression that no punishment should be imposed for a particular act.

But here, Mr. Chairman, I think the theory is what is more important. Juries do speak for the community. In the military, traditionally they have spoken for the military society in imposing a sentence and I think that that is a practice that should be retained.

Mr. **Principi**. Why do you exclude the judge from the military community?

Mr. **Honigman**. Well, I don't exclude him from the community, but in a community where many of the crimes have what I guess I can only describe as an operational significance, offenses against discipline, absence without leave and so on, jurors who bring an operational experience, who understand what it means to be standing watch when somebody is AWOL, who understand the impact of an offense against discipline may have a certain perspective as to the seriousness or even as to the extenuating circumstances that a military judge who has not served in that capacity could bring to the question of the sentence.

Mr. **Principi**. I would submit that a great many of the military judges in uniform today have the very operational experience that you are alluding to. Many of them have prior operational service before attending law school and many serve aboard ships and stand watches. I think you are doing a great disservice to the judiciary by stating that they are not part of this military community when they live and work in the very communities as the jury.

Mr. **Honigman**. Mr. Principi, I have no intention of implying that the military judiciary is not a part of the military society. I was really trying to draw upon, I guess, my own experience. Many of the judges who I knew when I was serving on active duty had gone up through the ranks of the Judge Advocate Generals Corps but had not ever been in command of a unit or stood watch on a ship or had that sort of background. If the situation has changed at this point, it could change again in the other direction in the future.

Mr. **Principi.** Well, I agree that not all judges do have that experience but, as Judge Everett stated, there are ways for the military community to make their views known to the military judge. They have that right to come into court via the trial counsel and express the views of the military community.

It just seems inconsistent to me that on one page of your statement you state that "Perhaps no other element of the UCMJ contributes as strongly to the perception and at times the reality of unfairness as the fact that the same commander who personally decides to invoke the military justice process also personally selects the jurors who will determine the accused's guilt or innocence and award the sentence of the court." Then later on you state that you opposed sentencing by a judge alone. It is difficult to understand the rationale if your major concern is command influence.

Mr. **Honigman.** Well, shall I say that I think on the one hand the random selection of jurors, even if they are not members of the expanded pool that I advocate, is a change that should come soon. I think if either one or the other changes should take place, random selection is the preferable alternative to going to judge alone sentencing.

Mr. **Principi.** Let me ask just one other question. You raise a very interesting point with respect to the Code Committee. Have you expressed your views with respect to expanding the membership of the Code Committee with the Judge Advocate Generals and the General Counsel of the Department of Defense to see whether they would agree to have this civilian membership, those who are knowledgeable of and interested in military justice, to play a role?

Mr. **Honigman.** The expansion of the Code Committee has been a proposal that the city bar association has advocated for many years. Most recently in comments that I submitted with regard to the proposed new rules of the court of military appeals I made a similar recommendation. Upon occasion I, and I believe Mr. Fidell, have attended meetings or portions of meetings of the Code Committee. But I think that that expansion should be on an institutional basis. The civilian members should be selected, they should understand their obligation to serve, they should have access to the same information, statistical information as well as arguments available to the Code Committee, and that is a change that has not yet taken place.

Mr. **Principi.** Does the ABA agree with your position?

Mr. **Honigman.** I would have to defer to the ABA's representative.

Mr. **Principi.** Thank you.

Mr. **Honigman.** I believe that the remaining remarks presented in my text probably do speak for themselves, and I will be glad to answer any questions that you may have at this time.

[The prepared statement of Steven Honigman follows:]

PREPARED STATEMENT OF STEVEN S. HONIGMAN, CHAIRMAN, COMMITTEE ON MILITARY JUSTICE AND MILITARY AFFAIRS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. Chairman and members of the subcommittee, my name is Steven S. Honigman. I appear on behalf of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York.

In years past, the committee has issued a draft of a comprehensive bill to improve the military justice system and has commented on bills to amend the Uniform Code of Military Justice (the UCMJ) under consideration by the House of Representatives. The committee and I appreciate this opportunity to offer our comments regarding the important proposals for amending the UCMJ that are now pending before this subcommittee.

In the committee's view, both S. 2521 and the bill submitted by the Department of Defense (the DOD bill) contain many provisions that merit prompt enactment into law. However, we do not support every one of the proposed amendments. (For example, we are opposed to eliminating the military jury's traditional role in assessing the sentence of the court-martial.) Finally, we regret that the two pending bills do not include a number of improvements to the military justice system that are worthy of legislative attention at this time.

Rather than address each bill and the committee's own proposals separately, I would like to organize my comments on a subject-by-subject basis. In the interest of brevity, I will limit my remarks to those sections of the pending bills which the committee strongly supports or opposes.

APPELLATE COURTS

The committee urges the adoption of the DOD bill's provision for direct, discretionary review by the Supreme Court of decisions of the Court of Military Appeals. For the reasons stated by Mr. Taft in his testimony of September 9, 1982, permitting such expeditious appeal of decisions of the Court of Military Appeals will enhance the fundamental fairness and the efficiency of the military justice system.

Both the accused, whose right to relief may be more speedily vindicated, and the Government, which may succeed in overturning an unfavorable ruling in the Court of Military Appeals, will benefit from the availability of such direct review by the Supreme Court.

In one important respect, however, the DOD proposal should be improved. We appreciate the considerations of docket congestion which prompt the restriction of the Supreme Court's jurisdiction to cases actually considered by the Court of Military Appeals. However, to that extent the military accused whose conviction is reviewed only by the military's intermediate appellate court (the Court of Military Review) will not enjoy the same access to the Supreme Court as a civilian who may have committed an equally serious crime, received an identical sentence, and asserted a similar error on appeal. We understand that the limited opportunity to obtain Supreme Court review proposed by the Department of Justice and set forth in the DOD bill may be the only practicable formula for such review at this time. But to ease its impact upon military accuseds, we recommend that article 67 be amended to require the Court of Military Appeals to grant a petition to consider a case where one judge finds that the petition for review has merit.

As both the DOD bill and S. 2521 recognize, promoting the finality and predictability of appellate interpretations of the UCMJ is a particularly important goal. A major step toward achieving that objective would be the expansion of the number of judges of the Court of Military Appeals from three to five. Regrettably, the pending bills do not propose such an amendment.

It appears inevitable that changes in the membership of a three-judge Court of Military Appeals will lead to instability and uncertainty in the law. Particularly in view of the number of two to one decisions that have been rendered in recent years, the Court will continue to be subject to abrupt shifts in its interpretative philosophy—with consequent disorder in the administration of military justice in the field—when a single judge is replaced. The unsettling impact of a single new member would be far less pronounced upon a five-member court.

For reasons of fairness and to promote longevity of service by judges of the Court regardless of the size of its bench, the retirement benefits provided by S. 2521 should be enacted.

Turning to the intermediate appellate courts, we support the proposed amendment which would allow a Court of Military Review as a whole to reconsider the decision of an individual panel of that court.

THE CODE COMMITTEE

Mr. Taft noted in his testimony last week that the Code Committee performs an extremely valuable function by surveying the operation of the UCMJ and reviewing amendments to the Code proposed by the Joint Service Committee on Military Justice. We support the inclusion of the Director, Judge Advocate Division, Headquarters, U.S. Marine Corps, as an official member of the Code Committee. But we believe that membership on the Code Committee should be even broader.

As evidenced in part by today's testimony, members of the civilian bar (many of whom, like myself, have served with the Armed Forces) have a strong professional interest in military justice. Yet such civilian practitioners often find it difficult to join with their military brethren in assessing the operation of the military justice system and in formulating appropriate amendments to the UCMJ. The administration of the military justice system would benefit from participation by the civilian bar on a institutional basis, just as practicing attorneys serve as members of the judicial conferences of the U.S. Courts of Appeal. Moreover, the public's perception of the military justice system as fundamentally fair would be enhanced through such participation by civilian representatives.

Accordingly, the committee recommends that article 67 be amended to include three civilians as members of the Code Committee.

GOVERNMENT APPEALS FROM ADVERSE TRIAL RULINGS

The committee agrees that it is appropriate to provide a procedure for the Government to appeal certain adverse trial rulings by the military trial judge. Where the two bills differ, we prefer the standards and procedures set forth in the DOD bill. It should not be necessary for the convening authority, who typically is not a lawyer, to become personally involved in assessing the legal correctness of the trial judge's rulings or in approving appeals from those rulings as provided by S. 2521. Moreover, if a trial ruling is sufficiently important to merit an interlocutory appeal by the Government, then an adverse decision of the Court of Military Review should similarly be appealable immediately—by either the accused or the Government—to the Court of Military Appeals.

In the committee's view, an appeal by the Government should not automatically stop the clock with regard to the right of a confined accused to receive a speedy trial. Instead, where the accused can show that the Government's appeal was frivolous, or that resolution of the appeal was unduly delayed, any delay occasioned by that appeal should be charged to the United States in deciding an issue as to denial of a speedy trial.

DESIGNATION OF MILITARY JUDGE AND COUNSEL AND EXCUSAL OF MEMBERS FROM THE COURTS-MARTIAL

The Department of Defense makes a persuasive case for relieving busy commanders of the unnecessary administrative burdens of personally designating military judges and counsel and personally excusing members from service on courts-martial. The committee recommends that the DOD bill's provisions regarding those matters be adopted.

SELECTION OF COURTS-MARTIAL MEMBERS

In another important respect, the commander should also be relieved of an unnecessary administrative burden—personal selection of the members of the courts-martial jury under article 25(d)(2). Perhaps no other element of the UCMJ contributes as strongly to the perception—and at times the reality—of unfairness as the fact that the same commander who personally decides to invoke the military justice process also personally selects the jurors who will determine the accused's guilt or innocence and award the sentence of the court.

This spectre of command influence over courts-martial proceedings should be eliminated. Instead of being personally detailed by the commander, members of courts-martial should be chosen at random from a pool of eligible individuals within the command.

Furthermore, the pool of potential military jurors should be expanded. In addition to the commissioned or warrant officers and senior enlisted personnel who in practice comprise the military juries of today, all petty officers or non-commissioned officers above the pay grade of E–3, and who have not themselves been convicted of an offense by courts-martial, should be eligible for military jury duty. The committee believes that random selection of military jurors from such a pool (subject to the current restriction that "where it can be avoided" no member of an Armed Force will be tried by a military juror who is junior to him in rank or grade) would guarantee that courts-martial would be composed of persons who meet the current statutory criteria of age, education, training, experience, length of service, and judicial temperment, while securing to the accused the right to be tried by his military peers.

The expansion of the jury pool envisioned by the committee would realize other important objectives. Jury duty is one of the few activities in which a citizen is able to participate directly in the functioning of his or her society and to act as the representative of that society's ethical norms. The effect upon enlisted morale of the civic identification and pride that would flow from the privilege of jury service would be a valuable by-product of the expanded eligibility criteria.

Would expansion of the jury pool lead to unjust acquittals of culpable defendants by sympathetic enlisted members? It seems unreasonable to presuppose that enlisted members of courts-martial will condone lawlessness or prove reluctant to impose an appropriate punishment. The proposed criteria would eliminate those enlisted persons whose shortness of service or demonstrated disregard for law would make them unsuitable court-martial members. But there is certainly no reason to consider a twenty-three year old E-4 electronics technician (or infantryman) any less fit to render an impartial judgment than his civilian counterpart.

JUDGE-ALONE SENTENCING

The committee does not believe that there is a persuasive rationale for the provision of S. 2521 which, in all non-capital cases, would eliminate the military jury's traditional responsibility for determining the sentence imposed by the court-martial. To the contrary, in the committee's view there are compelling arguments in favor of continuing to permit the military jury to award the sentence at the option of the accused. In consequence, the committee strongly opposes mandatory judge-alone sentencing.

One of the cornerstones of our jurisprudence is the role of the jury in expressing and applying the ethical norms of the community. By virtue of their operational experience and perspective, the current members of the blue ribbon juries (as well as jury members who would be selected at random and in accordance with the eligibility criteria recommended by the committee) should be considered well-suited to act as the spokespersons of the military community in assessing the severity of the offense and fashioning an appropriate form and quantum of punishment. If the accused wishes to call upon that experience and perspective with regard to his sentence, he should retain his option to do so.

In addition, the availability of military juror sentencing serves as a valuable institutional check upon the imposition of excessively harsh sentences by a military judge. Where accuseds consistently choose not to be sentenced by a particular military judge, that judge may reconsider his sentencing philosophy and conclude that the sentences that he believes to be appropriate in fact exceed the norms applied by sentencing jurors.

Finally, it is possible that a defense counsel may be more willing to lock horns with the military judge on issues relating to his client's guilt or innocence when he knows that the judge will not impose the sentence if his client is convicted.

We also note in passing that removal of the military jurors' sentencing responsibility would provide a further justification for the abolition of the blue ribbon jury personally selected by the commander and for its replacement by the randomly-selected jury advocated by the committee.

SUSPENSION OF THE SENTENCE

Unlike the Department of Defense, the committee favors granting the power to suspend the sentence to the authority (either the military jury or the military judge) who awards it.

The question of whether a sentence should be suspended is not exclusively a commander's manpower management concern in which the paramount issue is the possibility that the accused will commit additional crimes if he is retained upon active duty. To the contrary, authority to suspend all or part of a sentence should logically flow from the court-martial's responsibility to hear and assess evidence in extenuation and mitigation of the offense. While the magnitude of an offense itself might merit a substantial sentence (such as a punitive discharge), extenuating or mitigating factors could argue in favor of granting the accused a second chance. Those countervailing factors should be balanced in the first instance by the military judge or military jurors, who (unlike the convening authority who conducts his clemency review upon a cold record) will have the benefit of an opportunity to personally evaluate the demeanor and persuasiveness of the accused and his witnesses in extenuation or mitigation.

Of course, granting suspension power to the court-martial should not restrict or prejudice the convening authority's own discretion to suspend any remaining elements of the sentence in the interest of post-trial clemency, or his authority to revoke the suspension in light of subsequent misconduct by the accused.

JURISDICTION OF THE SPECIAL COURTS-MARTIAL

The committee does not oppose expanding the jurisdiction of the special courts-martial to include confinement of up to 1 year. Like the Department of Defense, we recommend that all of the protections afforded an accused when a bad-conduct discharge may be adjudged by such a court also apply when confinement of more than 6 months may be requested by the government. Such protections should include the right to appeal to the Court of Military Review upon a full verbatim record where confinement in excess of 6 months is imposed.

THE TRANSCRIPT

A meaningful review of courts-martial proceedings is virtually impossible in the absence of a verbatim record of those proceedings. In those cases where a legal or clemency review by a judge advocate, the convening authority, or the Judge Advocate General would be permitted upon a non-verbatim record, meritorious arguments in favor of clemency, or the existence of legal errors prejudicial to the substantial rights of the accused, may never come to the attention of the reviewing officer. For example, where the inquiry attending the acceptance of an accused's guilty plea is summarized, nuances in question and answer which could cast doubt upon the providence of the plea may be overlooked or not fairly reproduced by the person who prepares the summary.

However, we also recognize the importance of streamlining review procedures and reducing the administrative burden of preparing a complete verbatim transcript in every case. Here the proposed elimination of automatic appeals provides an appropriate model. Just as an accused would be able to waive his right to take an appeal, an accused should also have the option of waiving the preparation of a complete verbatim transcript for the purposes of the convening authority's clemency review, or a review under revised articles 64 or 69.

We understand that the American Civil Liberties Union has recommended that all reviews conducted in the office of the Judge Advocate General be performed by officers certified as special court-martial military judges. Since such judicial certification (and the specialized training that it presupposes) appears likely to enhance both the quality of such reviews and the perception of them as a judicial appellate process, and would impose little additional burden upon the administration of military justice, the committee joins in that recommendation.

ELIMINATION OF AUTOMATIC APPEALS

Finally, the committee agrees that the automatic processing and resolution of appeals which the accused (after consultation with counsel) does not wish to pursue constitutes an unnecessary burden upon the military justice system. For that reason we endorse the proposed amendments to replace the current system of automatic appeals with the requirement that an accused notice the taking of an appeal if he wishes an appellate court to review his conviction and sentence. In that regard, we agree with the Department of Defense that any waiver of an accused's right to appeal should be made affirmatively, and should not be presumed from the accused's inaction.

Mr. Chairman and members of the subcommittee, this concludes my prepared remarks. I would be happy to answer any questions that you may have.

Senator JEPSEN. I have no further questions. Your testimony was very interesting and will be very helpful. We appreciate it.

Mr. HONIGMAN. Thank you, Mr. Chairman. I appreciate the chance to offer it to you.

Senator JEPSEN. This has been one of the most interesting hearings that we have had in some time and I appreciate all of the testimony that has been offered here this morning and the spirit in which it has been offered.

The word "justice" is sufficient to cover the whole broad area of what makes people do things. I think we don't appreciate enough, whether we are in or out of the military in this country, the need for real justice and the importance of making sure we have real justice in the consensus of our society. People don't burn and riot and tear down things because their stomachs are empty in this country, although to listen to some that is the reason you would think they are doing it, but they move to action because of what they consider to be injustice.

So I think the subject matter that we are examining and reflecting and exchanging ideas about this morning is very key. In the military you have the unique dimension of having a special duty, and that is providing for the national security of this country with the very basic military mission of being able to move, communicate and shoot when necessary when called on to do so. The role that justice plays with respect to discipline and the commanders being able to command their units has been woven very intricately into the discussions and the testimony this morning.

I appreciate it. It has been rich, it has been rewarding and it will be very helpful. We look forward to continuing to work with you and we may call upon you as we develop this thing to hopefully fine-tune it so that we really do end up with a combination, first of all, with justice being considered by everybody involved and at the same time being able to make sure that we do everything to shore up the ability of our military forces to move, communicate, and shoot when necessary.

Thank you very much.

The prepared statement of the American Veterans Committee concerning military justice legislation will be entered in the hearing record at this point.

[The prepared statement of the American Veterans Committee follows:]

STATEMENT OF THE AMERICAN VETERANS COMMITTEE CONCERNING MILITARY JUSTICE LEGISLATION

Mr. Chairman and members of the committee: It is a pleasure to present this testimony to you on behalf of the American Veterans Committee. My name is Frank E. G. Weil. I am the national secretary of the AVC and also serve as chairman of its Commission on Veterans and Armed Services.

AVC has reviewed S. 2151, the Military Justice Act of 1982, and has the following comments (the comments are arranged in the order of the articles of the Uniform Code of Military Justice affected):

AVC endorses a broadening of the term "record" in article 1(14) to include videotapes and audiotapes, as well as any other form of record.

AVC endorses the insertion into article 6(a)(2) that a judge advocate must be a member of the bar of some State or other jurisdiction. However, AVC does not endorse the additional language, set out on page 2, lines 20–25 stating that "no person may be assigned * * *." AVC is concerned about the phenomenon—which is, admittedly, limited to wartime situations or those in which a draft operates—the phenomenon of the enlisted (or inducted) lawyer. AVC believes that some role should be found for persons who are members of a bar, but who find themselves in the Armed Forces as enlisted personnel. We realize that such persons will not be designated under article 27, but they should not be barred from doing legal work, such as legal assistance, claims et cetera.

AVC endorses the amendment of article 16(1)(B) which allows the accused's decision to be tried by a military judge sitting alone to be expressed orally on the record.

AVC endorses the amendment to article 16(3) which provides that courts-martial, except those in which a death sentence is possible, or those (hopefully few in numbers) where no military judge is assigned, shall consist of a military judge only after the finding is announced, in other words that sentencing is to be by the military judge alone.

AVC conditionally endorses the amendment of article 19 to expand the jurisdiction of special courts-martial from 6 months to 1 year, provided that only a special court-martial to which military counsel are assigned, and which keeps a full record may exceed a 6-month sentence.

Concomitantly, AVC opposes deleting the requirement for a full record in BCD cases.

The amendment proposed to article 26 is consequential to that in article 16(3) *supra*.

AVC endorses the amendment to article 32(a) allowing the accused, after being properly counseled, to waive the article 32 investigation in writing.

AVC opposes the amendment to article 34(a) allowing the SJA advice to the convening authority to be oral. If it were to be adopted, casual conversation between SJA's and convening authorities in the officers club or on the golf course may well be labeled oral advice.

AVC opposes language for article 34(c) stating that failure to follow its provisions is not jurisdictional error, unless this means that everywhere else, failure to follow the provisions of the UCMJ is jurisdictional error.

AVC endorses the broadening of the duties of the defense counsel following a conviction, as proposed in article 38(c).

AVC endorses the expansion of the number of peremptory challenges to three as proposed in article 41(b). If the objection raised in the testimony of others, that this would require the detailing of an excessive number of offices to a court-martial, only to have them excused for a peremptory challenge is, indeed a significant problem, AVC would suggest a procedure whereby at least some peremptory challenges could be raiseed preliminarily, possibly in writing, so that the number of officers who must physically attend the site of the courts-martial is not increased, but so that the defense has, by that time, already had an opportunity to weed out officers whose general leanings or ideas on discipline are known to be extremely strict.

While AVC does not believe there is going to be much need for this change, AVC endorses the amendment to article 46 providing for service (presumably to reluctant civilian witnesses) of process by U.S. marshals.

AVC endorses the amendments to article 49 (b) and (f) which provides that depositions are to be admitted, rather than specifying that they are to be read, thus providing for the possibility of videotaped depositions,

AVC endorses the requirement in article 53, that the court is to announce to the accused what his rights to appeal are. While it might not always be necessary, this provision may do some good, and appears not to impose a heavy burden.

AVC opposes the provisions in article 54 that a record is required only where an appeal is filed, because, unless the provisions elsewhere in this bill, which AVC also opposes, are adopted, a BCMR or possibly a DDR may need to look at the record. If there is a way to preserve the notes or recordings, and transcribe only where needed, either in an appeal, or in connection with DDR or BCMR proceedings, then AVC would withdraw its opposition.

AVC endorses the proposed new article 57a which would give the military judge the authority to suspend sentences. The military judge, having conducted the trial, is in a better position to decide, in the light of the particular facts, whether suspension is appropriate. This aritcle is particularly useful in combination with the amendment to article 16(3) which allows the military judge to impose sentence, the two can be exercised for this change, AVC endorses the amendment to article 46 providing for service (presumably to reluctant civilian witnesses) of process by U.S. marshals.

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AVC endorses the provision of article 60 governing actions by the convening authority. Since convening authorities generally are not lawyers, it is inappropriate to vest them with duties concerning the court-martials which should be expected only of lawyers.

AVC endorses the concept of the notice of appeal as contained in proposed article 61, but believes that the period of 10 days—with extension at the discretion of the convening authority—is too short. The accused should be granted at least one extension of at least 10 days as of right.

AVC opposes the concept of appeal by the Government, as set out in proposed article 62(a). We believe that the parallel Federal criminal law provision was inserted in title 18 as a result of law-and-order pressure and should be repealed. If, however, the concept is retained, the time involved should not be excepted from the speedy trial arithmetic; the temptation to launch an appeal where the speedy trial time would otherwise be running out may well be irresistible in some instances. Certainly, if the Government's right to appeal will be exercised very cautiously. Also, again since the convening authority is usually not a lawyer, the impetus for beginning an appeal should lie with the trial counsel superior—the SJA or (where trial attorneys are in a separate hierarchy), the chief trial counsel or similar figure.

AVC opposes limiting rehearings, as proposed in the deletion of present article 63(b).

AVC endorses the amendment to article 64, covering review by a judge advocate.

AVC endorses the amendment to article 65(a), but as to article 65(b) refers to our comments on article 54 *supra*.

AVC endorses article 66 allowing Courts of Military Review to reconsider cases *en banc;* the rest of the amendment to this article is consequential to earlier amendments.

AVC endorses the concept of providing retirement and survivor annuities for judges of the Court of Military Appeals as proposed in article 67a, but expresses no opinion as to whether the details proposed therein are the most appropriate or not.

AVC endorses the concept set out in proposed amendments to article 69, but differs on two points: (a) the delimiting date should not be October 1, 1983, but a date at least 2 years after enactment, and (b) the persons examining records in the Office of the Judge Advocate General should be certified as Military Judges at least at the Special Courts-Martial level.

AVC endorses the amendments proposed to article 71 concerning the execution and suspension of sentences.

AVC opposes the addition of a new article 122a on controlled substances. The definitions may be unobjectionable, but the sentences set out are extremely harsh.

AVC opposes the proposed limitations on 10 U.S.C. 1552.

With respect to the Defense Department proposed bill, AVC has despite requests addressed both to the subcommittee and to the Department, been unable to obtain a copy. The following comments are based on a review of the Defense Department testimony, as well as the testimony of a number of witnesses at the September 9 and 16 hearings, including the services and the ACLU:

Extending the certiorari process to the U.S. Court of Military Appeals, as proposed in the DOD bill: AVC generally endorses the concept. We also, however, endorse the ACLU position, which believes that the present USCMA practice of requiring a majority of the USCMA judges to grant a petition before USCMA review takes place, will place too great a burden on the route to the Supreme Court. We are, however, reluctant to impose on the Court of Military Appeals the (presumably much larger) burden of hearing cases based on the view of one judge alone. Accordingly, we propose two possible alternative possibilities. The first, while leaving the USCMA rule unchanged insofar as review by that court is concerned, would allow certiorari to be applied for, based upon leave from any one judge of USCMA. The result of such a provision might be that it will be somewhat easier for cases which, in the opinion of any one USCMA judge, urgently require review by a higher court, to be heard by USCMA, if that judge can announce to his colleagues that he is prepared to grant leave to apply for certiorari. In such cases it might be marginally easier to obtain the second vote. The second possibility might be to introduce a procedure whereby leave to seek certiorari can be granted by any USCMA judge, provided at least one other judge votes "no objection."

AVC is also concerned about the possibility that, if Special Courts-Martial are to be authorized to adjudge sentences longer than 6 months, there might be many cases of sentences between 6 months and 1 year which will be reviewed in a somewhat cursory manner. Such sentences should, in AVC's view, be eligible for CMR review, and if not reviewed by CMR, be reviewed by an officer certified as a Special Courts-Martial Military Judge.

AVC believes that CMR judges should be given a fixed tenure, perhaps of 4 years, and that the possibility of interservice assignment should be opened up and pursued—but not to the point where the CMR reviewing a case of an individual from one of the services has, except in exceptional circumstance (such as the involvement of personnel from more than one service in the fact situation) a majority of members from that service.

AVC believes that the Code Committee should hold open meetings, and either have an expanded membership, to include the civilian bar, or provide for an advisory committee on which the civilian bar would be well represented. AVC endorses the proposal to include Marine Corps representation on the Code Committee.

AVC believes that the convening authorities need not be required to excuse members in person, and that this authority can be safely delegated, both before and during the trial. Since, in several of the services, military judges, defense counsel and trial counsel are ordinarily not within the assignment jurisdiction of convening authorities, the provision requiring convening authorities to assign such personnel is obsolete and should be replaced.

AVC also endorses the provision discussed at pages 36-37 of the DOD testimony, and believes that, in a rehearing situation, either both prosecution and defense should be bound by a prior prehearing agreement, or neither side should be so bound.

Thank you for this opportunity to express the views of the American Veterans Committee.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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